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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN RAILWAY AND
AIRWAY SUPERVISORS ASSOCIATION, *et al.*,
Petitioners,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a railroad which is, and for many years has been, a party to the railroad industry's national health and welfare plans, and which has participated in national negotiations concerning those plans, may refuse to participate in national negotiations over those plans and may negotiate individually to establish its own health and welfare plans in lieu of the national plans, without providing notice of its intentions to all participants in the national plans and negotiating over those matters in national negotiations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The Origin of the National Plans	4
B. The History of the Soo's Bargaining Over Health and Welfare Issues and Background of the Current Dispute	5
C. The District Court's Decision	6
D. The Court of Appeals' Decision	7
REASONS FOR GRANTING THE WRIT	9
I. THE INSTANT CASE INVOLVES IMPORTANT ISSUES CONCERNING COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY	10
II. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH DISTRICT OF COLUMBIA CIRCUIT PRECEDENT	13
III. REQUIRING THE SOO TO NEGOTIATE NATIONALLY OVER ITS PROPOSED WITHDRAWAL FROM THE NATIONAL HEALTH AND WELFARE PLANS WOULD NOT INFRINGE UPON THE SOO'S RIGHTS UNDER SECTIONS 2 THIRD AND FOURTH OF THE RAILWAY LABOR ACT	20
CONCLUSION	23

TABLE OF AUTHORITIES

CASES: Page

American Railway and Airway Supervisors Association, et al. v. Soo Line Railroad Company, 891 F.2d 675 (8th Cir. 1989) ..... *passim*
Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1982) 6, 7, 19
Brotherhood of Railway, Airline and Steamship Clerks v. Florida East Coast Railway, 384 U.S. 238 (1966) 4, 19
Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) ..... *passim*
Chicago, Burlington & Quincy Railroad v. Railway Employees Department, AFL-CIO, 301 F. Supp. 603 (D.D.C. 1969) 15-16, 17
Delaware and Hudson Ry. Co. v. United Transportation Union, 450 F.2d 603 (D.C. Cir. 1971) 18
Derrico v. Sheehan Emergency Hospital, 844 F.2d 22 (2d Cir. 1988) 19
International Association of Machinists v. *National Railway Labor Conference*, 310 F. Supp. 905 (D.D.C. 1970) ..... *passim*
International Brotherhood of Electrical Workers v. National Railway Labor Conference, 132 LRRM 2412 (D.D.C. 1988) 9
Kennedy v. Long Island Railroad, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963) 11
Lumber Production Industrial Workers Local #1054 v. West Coast Industrial Relations Assoc., 775 F.2d 1042 (9th Cir. 1985) 19
Order of R.R. Telegraphers v. Chicago & North Western Ry., 362 U.S. 330 (1960) 3
Patterson Parchment Paper Co. v. International Brotherhood of Papermakers, 191 F.2d 252 (3d Cir. 1951), *cert. denied*, 342 U.S. 933 (1952) 19
Proctor & Gamble Independent Union v. Proctor & Gamble Manufacturing Co., 312 F.2d 181 (2d Cir. 1962) 19

TABLE OF AUTHORITIES—Continued

Page

Railway Labor Executives' Association v. National Railroad Passenger Corporation, No. 88-1816 (D.D.C.) 9

United Transportation Union v. Atchison, Topeka & Santa Fe Ry., No. 89-C-06469 (N.D. Ill.) 9

United Transportation Union v. Chicago Illinois Midland Ry., No. 89-3014 (C.D. Ill. filed Jan. 18, 1989) 9

United Transportation Union v. Chicago, South Shore & South Bend Ry., No. 89-C-0901 (N.D. Ill. filed Feb. 3, 1989) 9

United Transportation Union v. Duluth, Missabe & Iron Range Ry., No. 5-88-178 (D. Minn. filed Sept. 2, 1988) 9

United Transportation Union v. Elgin, Joliet & Eastern Ry., No. 88-C-7708 (N.D. Ill. filed Sept. 6, 1988) 9

United Transportation Union v. Grand Trunk Western Ry., 6th Cir. No. 89-1523 (decided February 21, 1990) 9

United Transportation Union v. Houston Belt & Terminal Ry., et al., No. H-89-439 (S.D. Tex. filed Feb. 3, 1989) 9

United Transportation Union v. Illinois Central Ry., No. 88-C-9607 (N.D. Ill. filed Nov. 8, 1989) .. 9

United Transportation Union v. Lake Terminal R.R., et al., No. C-88-1314 (N.D. Ill. filed Sept. 2, 1988) 9

United Transportation Union v. Terminal R.R. Association of St. Louis, No. 89-3070 (S.D. Ill. filed Feb. 3, 1989) 9

United Transportation Union v. Texas-Mexican Ry., No. L-89-7 (S.D. Tex. filed Jan. 24, 1989) 9

STATUTES AND OTHER MATERIAL RELIED UPON:

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 6

TABLE OF AUTHORITIES—Continued

Page

Railway Labor Act, 45 U.S.C. § 151, *et seq.* .....*passim*
Section 2 First, 45 U.S.C. § 152 First 2, 7, 8, 20
Section 2 Second, 45 U.S.C. § 152 Second 2
Section 2 Third, 45 U.S.C. § 152 Third .....*passim*
Section 2 Fourth, 45 U.S.C. § 152 Fourth .....*passim*
Hearings on S. 2646 Before Senate Subcommittee of the Committee on Interstate Commerce, 68th Cong., 1st Sess. (1926) 3
Jones, *Wages and Labor Relations in the Railroad Industry 1900-1941* 3, 10
Report of Emergency Board No. 114 (December 12, 1955) 4
Wolf, *The Railroad Board* (Univ. of Chicago Press 1927) 3
28 U.S.C. § 2101(c) 2
28 U.S.C. § 1254(1) 2

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v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners [1] respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on December 13, 1989 in *American Railway and Airway Supervisors Association, et al. v. Soo Line Railroad company*, 891 F.2d 675 (8th Cir. 1989).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 891 F.2d 675 and is reprinted as Appendix A hereto at 1a-10a. The ruling of the United States District Court for the District of Minnesota

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[1] Petitioners are labor organizations which represent various classes and crafts of railroad employees throughout the United States, and whose members receive health and welfare benefits under the railroad industry's national health and welfare plans. Petitioners, referred to herein as the "Unions," are listed individually in Appendix E hereto.

(Murphy, J.), was issued on July 6, 1988 and is reported at 690 F. Supp. 802 (D. Minn. 1988), and is reprinted as Appendix B hereto at 11a-23a. The District Court's judgment is printed in Appendix C hereto at 24a-27a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its decision on December 13, 1989. Petitioner has not sought rehearing and is filing this petition within the time prescribed by 28 U.S.C. § 2101(c). Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The complaint underlying this action was brought under the Railway Labor Act [hereinafter, "RLA"], 45 U.S.C. § 151, *et seq.* (Sections 2 First, 2 Second and 2 Third, 45 U.S.C. §§ 152 First, Second and Third). Relevant portions of that statute are reprinted as Appendix D hereto at 28a-29a.

STATEMENT OF THE CASE

Petitioners are labor organizations most of which represent employees of Respondent Soo Line Railroad Company [hereinafter, "Soo"] under the RLA. The other petitioners represent railroad employees and are participants in the national health and welfare plans which are at issue here. The underlying complaint was brought by the Unions on behalf of their members in response to the Soo's refusal to participate in national negotiations over proposals for changes in the railroad industry's national health and welfare plans. Moreover, rail labor's complaint challenged the Soo's insistence upon individual bargaining with subordinate components of the Unions over its proposal that it withdraw from the national plans and the national agreement establishing the industry-wide plans.

The Unions asserted that the Soo could withdraw from the national plans only by serving notice of its intentions

upon all parties to the national plans and by negotiating over its withdrawal in national negotiations, or "national handling" as it is referred to in the railroad industry.[2] In short, the Unions argued that the Soo could depart from the agreements establishing the national plans and national handling of health and welfare issues only through national handling, the same method by which it became a party to those agreements. The Eighth Circuit rejected the Unions' arguments, concluding that requiring the Soo to bargain nationally over its exit from the national health and welfare agreements and from national handling of health and welfare issues woud infringe upon the Soo's rights under the RLA to designate its own representative for collective bargaining. Appendix A at 5a-7a, *citing* 45 U.S.C. §§ 152 Third and Fourth.

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[2] Comprehensive negotiations involving rail unions and at least a substantial majority of rail carriers has been a rail industry practice since the turn of the century. *See* Harry E. Jones, *Wages and Labor Relations in the Railroad Industry 1900-1941* at 34-37, and *Hearings on S. 2646 Before Senate Subcommittee of the Committee on Interstate Commerce*, 68th Cong., 1st Sess. at 70-76 (1926) (Statement of C. P. Neil). *See also* H. D. Wolf, *The Railroad Board*, at 5-6, 12-13, 101-102 (Univ. of Chicago Press 1927). The practice of negotiating national agreements expanded during World War I under the Director General's operation of the railroads. *Id.* at 18-20, 39-44, 133-134, 166-169; *see also International Association of Machinists, et al. v. National Railway Labor Conference*, 310 F. Supp. 905, 911-912 (D.D.C. 1970), (*"IAM v. NRLC"*), *appeal dismissed*, 463 F.2d 872 (D.C. Cir. 1972). Negotiation of national agreements involving virtually all major rail carriers and all rail unions has been an industry practice for almost 60 years; indeed many of the most important agreements in the industry have been negotiated in that manner, *see e.g.*, the landmark Washington Job Protection Agreement of 1936, the national agreement between the unions and railroads constituting 85 percent of the nation's existing rail trackage which was referred to by this court in *Order of R.R. Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 337-338 (1960). Although the Court of Appeals concluded that national handling necessarily involves the designation of national bargaining agents for all participants (Appendix A at 2a), as is discussed *infra*, in Part III of the Reasons for Granting the Writ, the Unions submit that that conclusion is fundamentally erroneous.

The Unions respectfully seek the Court's review of the Eighth Circuit's decision because its effect would be to undermine many existing national agreements and to destabilize collective bargaining in the railroad industry; and because the Eighth Circuit's decision is in conflict with the decision of the District of Columbia Circuit in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*, 383 F.2d 255 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) ("*Atlantic Coast Line*"). And while the Unions agree that the Soo unquestionably has the right to designate its own representative for collective bargaining, they submit that that right would not be infringed upon by requiring the Soo to negotiate nationally over its proposal to withdraw from the national plans.

A. The Origin of the National Plans

The national health and welfare benefit plans had their origin in a 1954 agreement between a coalition of approximately 100 rail carriers and a coalition of approximately 15 unions. Pursuant to that agreement, the parties jointly subscribed to a national group health and life insurance policy with the Travelers Insurance Company ("Travelers"); that policy was designated as Travelers Group Policy No. GA-23000. *See*, Report of Emergency Board No. 114 at 27-29 (December 12, 1955).

The 1954 agreement had no fixed expiration date and, under the RLA, no expiration date was implied as a matter of law; indeed like most RLA agreements, the 1954 agreement was of indefinite duration. However, as is the practice in the industry, the parties initially, and subsequently, negotiated moratorium clauses which limited the service of proposals for changes in the national plans. Appendix B at 15a and n.4. *Cf. Brotherhood of Railway Airline and Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 258, 246-248 and n.7 (1966).

Through subsequent negotiations, more unions and more carriers became parties to the national health and welfare agreement, benefits were changed and dental and retiree

plans were negotiated. By 1985, the three health and welfare benefits plans covered approximately 320,000 active railroad employees and 9,500 retired railroad employees on 242 railroads. Appendix A at 3a. All modifications of the national plans which were made over the years were made through national negotiations. Appendix A at 2a-3a.

B. The History of the Soo's Bargaining Over Health and Welfare Issues and Background of the Current Dispute

Both the Soo's predecessor carriers and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company [hereinafter, "Milwaukee"], a railroad whose lines and agreements the Soo acquired in 1985, were parties to the 1954 agreement, and were participants in Group Policy No. GA-23000 when it was established in 1955. Between that time and 1985, the Soo, including its predecessors and the Milwaukee, always participated in national bargaining of health and welfare issues either by authorizing a multi-carrier committee to bargain on their behalf or by agreeing to be bound by the results of national bargaining; indeed in the round of negotiations which preceded the Soo's effort to withdraw from the national plans, the Soo expressly authorized the National Carriers' Conference Committee [hereinafter, "NCCC"] to be its representative in bargaining over health and welfare issues.

In early 1984, the Unions served Section 6 notices on various railroads including the Soo, for changes in rates of pay, rules and working conditions, including health and welfare benefits; the unions requested that each carrier designate the NCCC as its bargaining representative for negotiations on their proposals. Appendix B at 13a. Although the Soo agreed to national negotiations concerning pay and work rules, it refused national handling with respect to health and welfare benefits, stating that it would negotiate those matters "locally" and that it "intended to withdraw from the Travelers' policy and develop its own plans through self-insurance." *Id.* The Soo then

attempted to negotiate agreements with local union officials for the provision of health and welfare benefits under its own insurance plans, and it entered into agreements with local committees representing approximately 10 percent of its employees (Appendix B at 14a and n.3); however, the Soo conceded (Answer to Plaintiffs' Interrogatory No. 9) that the agreements covering most of those employees were contingent upon the results of this litigation.

C. The District Court's Decision

The district court rejected the Soo's contention that requiring it to negotiate nationally over its withdrawal from the national plans and over its decision to bargain locally about health and welfare issues, would infringe upon its rights under Section 2 Third and Fourth of the RLA. According to the district court, "an organization's selection of its bargaining representative is independent from its choice whether to engage in national handling" so that "it is possible that Soo, even if it chose to represent itself, may have been required to participate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO, as well as with the NCCC." Appendix B at 18a, footnote omitted.

However, upon review of *Atlantic Coast Line* and subsequent decisions which relied upon *Atlantic Coast Line*, the district court concluded that "courts have found national handling to be obligatory only after the parties had commenced national bargaining and then one attempted to withdraw or take action inconsistent with national handling." Appendix B at 19a, footnote omitted. The district court further relied upon precedent under the National Labor Relations Act, [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, that "withdrawal from multi-employer bargaining units may not be restricted prior to the commencement of bargaining." Appendix B at 20a-21a, footnote omitted, *citing Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410-412 (1982). Finding that the Soo noti-

fied the Unions of its intention to bargain locally before the national bargaining commenced, the district court concluded that Soo could not be required to engage in national negotiations on this issue. *Id.*

D. The Court of Appeals' Decision

The court of appeals recognized that Section 2 First of the RLA (45 U.S.C. § 152 First) imposed upon the Soo obligations to "exert every reasonable effort to make and maintain agreements" and to negotiate in good faith with the Unions; however, it held that the statute's guarantee that unions and carriers may designate their own representatives for collective bargaining precluded an order requiring the Soo to engage in national negotiations on its intention to withdraw from the national plans. Appendix A at 5a. The Court acknowledged that the Unions had denied any intention to dictate the Soo's choice of bargaining representative, but it concluded that the practical effect of the Unions' position was to the contrary (Appendix A at 7a), apparently upon the assumption that national handling necessarily involves the designation of national representatives for all participants in the bargaining process. Appendix A at 2a n.1.

The court of appeals concurred in the district court's determinations that the decision in *Atlantic Coast Line* and its progeny, which held national handling could be compelled in appropriate circumstances, were limited by the rationale of *Bonanno Linen* and other NLRA cases in which compulsory multi-party bargaining was limited to situations in which a party attempted to withdraw from multi-party bargaining after such bargaining had begun; and that *Atlantic Coast Line* and its progeny were actually consistent with that NLRA precedent. The court of appeals rejected the Unions' contention that the *Bonanno Linen* line of cases was inapplicable in this case because *Bonanno Linen* turned upon the expiration of existing

multi-party agreements and negotiations of new agreements under the NLRA, whereas RLA collective bargaining agreements do not expire and are subject to modification only through negotiations under Section 6 when contractual bars on service of Section 6 notices (the so-called "moratorium clauses") permit the filing of proposals for changes. The court found that the running of the moratorium period and the service of Section 6 notices were sufficiently like the expiration of NLRA agreements and the negotiation of new agreements that it was appropriate to conclude that despite the differences between the two statutes, the rationale of the NLRA precedent was applicable in this case.

Furthermore, since it concluded that the ability to refuse multi-party negotiations was derived from Section 2 Third, the court rejected the notion that a reluctant party could be compelled either to participate in national handling indefinitely or to bargain over the exercise of the purported statutory right to refuse national handling. Appendix A at 8a. However, it recognized that an adverse party retained the concommitant right to authorize a multi-party representative to negotiate on its behalf with the party seeking individual negotiations. *Id.* at 9a.

In sum, the Eighth Circuit held that even if a carrier is a party to a national agreement, established and amended through national handling, that carrier does not violate the RLA by seeking to withdraw from the national agreement through individual bargaining, so long as it announces its intention to withdraw prior to the commencement of negotiations for modification of the national agreeemnt, and so long as it complies with other RLA requirements concerning maintenance of existing agreements until bargaining and mediation are completed.

REASONS FOR GRANTING THE WRIT

This case presents significant issues affecting collective bargaining in one of the most important industries in the nation. Unlike other industries, there are many national agreements in the railroad industry which apply to virtually all major employers. If allowed to stand, the Eighth Circuit's decision would destabilize those existing national agreements, and would impede negotiation of additional national agreements because parties could simply withdraw from national handling over the subjects of those agreements whenever the moratorium provisions of those agreements permitted the filing of proposals for changes. The Eighth Circuit's decision would also lead to increased disruption of commerce because of the multiplicity of negotiations and potential disputes involving similar issues.

The need for the Court to grant the requested writ to address the questions presented herein is underscored by the Sixth Circuit's recent decision which substantially adopted the Eighth Circuit's reasoning. *United Transportation Union v. Grand Trunk Western Ry.*, 6th Cir. No. 89-1523 (decided February 21, 1990). Indeed, the importance of the issues presented here is further illustrated by the significant amount of litigation which has occurred over the last several years concerning the scope of a party's national bargaining obligation, as carriers have sought to unilaterally remove themselves from national handling.[3] Apart from the possible destabilization

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[3] In addition to the instant case and *Grand Trunk Western*, there have been many cases filed recently concerning national handling. Among the current cases are: *Railway Labor Executives' Association v. National Railroad Passenger Corporation*, D.D.C. No. 88-1816; *United Transportation Union v. Lake Terminal R.R., et al.*, N.D. Ohio, No. C 88-3414; *United Transportation Union v. Elgin, Joliet & Eastern Ry.*, N.D. Ill. No. 88-C-7708; *United Transportation Union v. Texas-Mexican Ry.*, S.D. Tex., No. L-89-7; *United Transportation Union v. Atchison, Topeka & Santa Fe Ry.*, N.D. Ill. No. 89-C-06469; *United Transportation Union v. Duluth, Missabe & Iron Range Ry.*, D. Minn. No. 5-88-178; *United Transportation*

of national handling generally, the Eighth Circuit's decision seriously undermines the railroad industry's national health and welfare plans which have been a basic element of rail industry working conditions for over thirty years.

Additionally, this Court's consideration of this matter is necessary to resolve the conflict between the District of Columbia Circuit's decision in *Atlantic Coast Line* and the Eighth Circuit's decision in the instant case. Also, the Court's review is necessary to clarify the nature of the obligation of carriers and rail unions in national handling, which the Unions submit, does not dictate the identity of a party's representative, but which does involve the locus of bargaining over issues which are appropriate for national handling.

I. THE INSTANT CASE INVOLVES IMPORTANT ISSUES CONCERNING COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY

The practice of multi-party bargaining began at the turn of the century as a union response to arguments by carriers that they could not agree to improved rates of pay, rules and working conditions unless their competitors were subject to such improved terms. *Jones*, *supra*, at 34-35. By negotiating certain standardized collective bargaining agreements, workers were able to achieve improved terms of employment and carriers were able to agree to such terms without fear of being undercut by a

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Union v. Terminal R.R. Association of St. Louis, S.D. Ill. No. 89-3070; *United Transportation Union v. Chicago Illinois Midland Ry.*, C.D. Ill. No. 89-3014; *United Transportation Union v. Illinois Central Ry.*, N.D. Ill., No. 88-C9607; *United Transportation Union v. Houston Belt & Terminal Ry., et al.*, S.D. Texas No. H-89-439. Two additional cases dealing with national handling issues were filed in the last few years but were dismissed on grounds unrelated to their merits; *International Brotherhood of Electrical Workers, et al. v. National Railway Labor Conference*, 132 LRRM 2412 (D.D.C. 1988) and *United Transportation Union v. Chicago, South Shore & South Bend Ry.*, N.D. Ill. No. 89-C-0901.

competitor or whipsawed by a union, at least with respect to the subjects of those agreements. Those same considerations have been recognized as demonstrating the importance of national handling in more recent times. *See e.g. IAM v. NRLC, supra*; *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963)

The mutually perceived benefits of national handling have resulted in national agreements which have been negotiated covering many of the most fundamental elements of the employees' collectively established employment conditions, including, but not limited to: wages, vacations, holidays, grievance procedures, the eight-hour day and overtime pay, the union shop, health and welfare benefits and employee protective arrangements applicable in railroad mergers, abandonments and subcontracting.[4] Some of those agreements involved substantially all of the unions and all of the major carriers, while others (where it was more appropriate) involved one or more unions and all of the major carriers. In any event, it is clear that national handling has been for more than half a century, and still is, an important factor in the rail industry's labor relations, since national agreements govern some of the most fundamental components of rates of pay, rules and working conditions other than those, which by their nature, are most appropriately handled in negotiations between individual unions and individual carriers.

The contribution of these national agreeemnts to stability in rail industry labor relations is readily apparent;

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[4] *E.g.*, The National Vacation Agreement of December 17, 1941; the Forty (40) Hour Week Agreement of March 19, 1949; the Union Shop Agreement of August 29, 1952; the National Health and Welfare Plan Agreement of August 21, 1955, the 1964 Shopcrafts Agreement and the Washington Job Protection Agreement of 1936. All of these agreements are on file with the National Mediation Board pursuant to Section 5(e) of the RLA. Wages have historically been negotiated nationally and there are many wage agreements on file with the NMB.

those agreements have established common working conditions for employees of the major railroads, standardized certain labor costs for those carriers and promoted continuity in the terms of the agreements covering those terms of employment. At least among the major carriers, which comprise the vast majority of rail trackage in the nation, wages, hours, vacations, health and welfare benefits and most rules, are uniform under national agreements. Accordingly, this industry has not been subject to the competition among employee groups to obtain as much as, or more than, other employee groups with respect to those subjects, and thus, a significant source of employee discontentment leading to union resort to self-help to remedy perceived inequities has been substantially reduced. Additionally, the major carriers have relatively similar labor costs in the areas addressed by the national agreements, which are in reality their major cost items, so that there generally has not been, until recently, a movement among the carriers to gain a competitive edge against other carriers by seeking concessions from their employees, and thus, this industry has not been subject to one of the major causes of labor unrest—employers using their labor costs as the main source of competition and profits. Accordingly, the national agreements have been a bulwark of stable industry labor relations for more than fifty (50) years.

The Unions submit that the Eighth Circuit's decision, if allowed to stand, would substantially undermine the stability provided by the national agreements. If carriers could exit from national agreements merely by refusing to participate in negotiations occurring after the running of a moratorium period, and by seeking to negotiate locally with only the unions which represent *their* employees over their withdrawal from such agreements, those agreements, obtained through painstaking negotiations and significant give-and-take on both sides of the table, could be rendered ineffective by the decision of one or more carriers to withdraw based upon some perceived

short-term gain to be obtained through individual bargaining.

Furthermore, if one or more major carriers did unilaterally withdraw from national handling on a given issue, there is a substantial likelihood that the union or unions involved would need to resist that withdrawal, and eventually would have to strike in order to prevent a departure from the national standard terms of employment; likewise if the carriers which bargained individually did obtain more advantageous terms, there is a substantial likelihood that the carriers which remained in national handling would press for concessions to prevent a competitive disadvantage with respect to the carriers which had withdrawn. Additionally, just the possibility of a multiplicity of negotiations over the same issues would increase the risk of disruptive disputes. Thus, the unilateral withdrawal of a party to a national agreement from bargaining over that agreement, and that party's individual negotiations over the same subject, would create significant risks and pressures on both sides of the bargaining table which would obviously engender increased resort to self-help with regard to subjects which previously had been governed by national agreements. By contrast, a requirement that a party negotiate its withdrawal from a national agreement in the same manner that it became a party to that agreement would respect the collective bargaining rights of all parties to the agreements, while maintaining a certain stability by preventing unilateral withdrawal from national bargaining over the subject of such agreement.

The reasons for requiring a negotiated exit from national handling are particularly compelling with regard to the subject of the health and welfare agreements. Obviously, health and welfare benefits are one of the basic components of any collective bargaining agreement today. Moreover, it is a subject which is uniquely well-suited for national handling because of the advantages obtained in

cost reduction through spreading risk among an extremely large pool of employees and a number of employers in different geographic areas of the country; when a carrier and its employees leave a national plan, the benefits obtained by spreading risks and premium obligations are reduced, both for that carrier and its employees and for the industry as a whole. Moreover, the ability of employees to remain with the same insurance carrier when they change from one railroad to another is a benefit to both employers and employees, preventing disputes over benefits coverage for such employees. Thus, health and welfare benefits coverage is a subject which is particularly appropriate for national bargaining. It is also a subject which has generated some of the most difficult collective bargaining in all American industry in recent years, and it is likely to continue to be a source of significant friction between labor and management in the near future; fracturing of bargaining over this subject in the rail industry will only increase the likelihood of disruptions of commerce over disputes on this subject.

Thus, given the foregoing, the Unions submit that the Eighth Circuit's decision allowing parties to unilaterally withdraw from national handling of health and welfare issues and to bargain individually over their withdrawal from the national plans presents substantial risks for increased strife in the railroad industry and there is therefore an urgent need for this Court to review the validity of the Eighth Circuit's decision.

II. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH DISTRICT OF COLUMBIA CIRCUIT PRECEDENT

The questions of whether and when a rail carrier, or a rail union, is required to engage in national handling on a particular issue was first addressed in 1967 by the Court of Appeals for the District of Columbia Circuit in *Atlantic Coast Line*. That case involved negotiations between the Brotherhood of Railroad Trainmen [hereinafter,

"BRT"] and eighty (80) carriers concerning the "crew consist" (i.e., the number of employees assigned a train's crew) rules for road and yard crews. The carriers contended that the issue should be subject to national handling because similar proposals were served simultaneously on a large number of carriers; the BRT contended that national handling was appropriate only upon mutual consent of the parties. The Court of Appeals for the District of Columbia Circuit held that national handling was not mandatory in that case. The court reached that conclusion after noting that while crew consist rules had occasionally been discussed on a national level, there had never been a national crew consist rule; that thousands of crew consist rules had been negotiated at the local level and that the neutral members of a special arbitration board [5] had opined that crew consist issues should be handled locally. The Court then stated that, 383 F.2d at 299, emphasis added:

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. *Whether it is also obligtaory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.* The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue.

The *Atlantic Coast Line* decision was subsequently relied upon in two decisions of the United States District Court for the District of Columbia: *Chicago, Burlington & Quincy R.R. v. Railway Employees Department, AFL-*

[5] Appointed pursuant to special legislation extending the cooling-off period in a previous dispute on that subject.

CIO, 301 F. Supp. 603 (D.D.C. 1969) (*"CB&Q v. RED"*), and *IAM v. NRLC, supra.* In *CB&Q v. RED*, several unions sought negotiations with one carrier for a special agreement on contracting-out of work to correct specific problems which had occurred on that carrier. The court concluded that because contracting-out had historically been negotiated on a national basis, and because the unions had sought national handling of contracting-out issues with other carriers, the unions could not compel the single carrier to negotiate individually regarding the proposed special agreement. Thus, the court stated (301 F. Supp. at 607, *citing Atlantic Coast Line*, 383 F.2d at 229):

> Having recognized the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees as the national representative of the carriers [when they negotiated the agreement they were now seeking to amend], the unions are not now free to compel the Burlington Railroad to bargain with them on a unilateral basis and thus break up the established multi-employer bargaining unit. When such a pattern of national bargaining has been established and the issues are not unique to the unions' dealing with any specific carrier, then both "the practical appropriateness of mass bargaining on that point" and "the historical experience" in h[illegible] the issues [sic] in the past make national ha[illegible] the matter obligatory.

In *IAM v. NRLC*, the court held that unions, which had historically negotiated wages on a national basis, and which had served identical Section 6 Notices for wage increases on each of the Class I railroads in the nation, could not strike individual railroads to obtain individual agreements. 310 F. Supp. at 611-612, *citing Atlantic Coast Line*, 383 F.2d at 229. The court concluded that the practicality of national bargaining on wages was "readily apparent" because "if wage adjustments were to be handled on an individual carrier basis, each carrier would be deterred from settling because of the possibility that a

competing carrier might obtain better terms, and by the same token, union members would be dissatisfied if employees on other railroads doing the same job, received higher salaries." *Id.* at 912.

In the courts below, the Soo argued that the *Atlantic Coast Line* standards regarding when national handling is mandatory were mere *dicta*; the Eighth Circuit noted Soo's contention, but did not accept or reject that claim. Appendix A at 5a. The Unions submit that upon review of the facts and the issues presented in *Atlantic Coast Line*, it is clear that the conclusion that national handling may be obligatory in appropriate circumstances was definitely not *dicta*. The *Atlantic Coast Line* court noted that the carriers had argued that national handling was mandatory "when similar proposals are served at about the same time by or upon a number of carriers" (383 F.2d at 228), and that the union had argued, as the Soo did and as the Eighth Circuit held, that national handling must be voluntary and that if it could be mandatory, a party could nonetheless provide sufficient advance notice of an intention not to engage in national handling and thereby relieve itself of any obligation to engage in national handling. *Id.* at 229. It is therefore clear that the question of whether national handling could be mandatory was squarely before the court of appeals in *Atlantic Coast Line*. The court then concluded that national handling could be mandatory in certain circumstances, but it rejected the formulations of both the carriers and the Unions and instead adopted a case-by-case approach which examined the nature of the subject for bargaining and the history of bargaining on that subject. 383 F.2d at 229. It then applied those standards in finding that national handling was not required in the case before it.

Moreover, any claim that *Atlantic Coast Line*'s discussion of when national handling is mandatory was mere *dicta*, is refuted by the district court's decisions in *IAM v. NRLC*, and *CB&Q v. RED*, and by the D.C. Circuit's

subsequent decision in *Delaware and Hudson Ry. v. United States*, 450 F.2d 603 (D.C. Cir. 1971), in which the court held that, although a union could not strike individual carriers to obtain an individual agreement on a matter subject to national handling, the union could strike individual carriers for the purpose of obtaining a settlement on a national agreement. In so holding, the court of appeals stated that the district court in *IAM v. NRLC* had "correctly understood the import and implication of our *Atlantic Coast Line* ruling" in concluding that national handling may be obligatory in some circumstances, depending upon the issues involved, the "practical appropriateness of mass bargaining" and the history of bargaining on the issue. 450 F.2d at 608-09.

Thus, prevailing precedent in the District of Columbia Circuit is that national handling may be mandatory regardless of whether a party states an intention to refuse national handling prior to the commencement of negotiations, and that whether national handling will be mandatory depends upon the appropriateness of the issue for national handling and the history of bargaining over that issue. Furthermore, it is readily apparent that in rejecting the BRT's argument that national handling must be voluntary, or that a party could give adequate notice of its intention to refuse national handling, the D.C. Circuit necessarily rejected the reasoning adopted by the Eighth Circuit in the instant case. Accordingly, the Eighth Circuit's conclusion that the nature of the issue and the history of bargaining over that issue are irrelevant (Appendix A at 5a), and that a party may refuse national handling merely by stating that it intends to bargain individually prior to commencement of negotiation of changes in the national agreement, is squarely in conflict with precedent in the D.C. Circuit.

The Unions submit that the D.C. Circuit's decisions are consistent with the commands of Section 2 First of the RLA, which require that parties exert every reasonable effort to make and maintain agreements, and with this

Court's recognition that railroad industry agreements are "usually of unlimited duration", and are generally only modified by subsequent negotiations which occur after running of moratorium clauses, as well as the Court's holding that after a strike, existing agreements continue in force except as modified by the strike settlement. *Brotherhood of Railway and Airline Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246-248 and n.7 (1966).[6] The Unions further submit that the D.C. Circuit's decisions are also consistent with practice in the railroad industry over many years and with practical realities in the industry. By contrast, the Eighth Circut's decision allowing a party to withdraw from national handling whenever a moratorium period runs, and before bargaining on changes in an agreement begins, is not consistent with the statute, this Court's precedent or the history and practice in this industry. Accordingly, this Court should review the Eighth Circuit's decision in order to resolve the conflict between that decision and the D.C. Circuit's precedent on this crucial issue.

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[6] The fact that rail industry agreements do not expire, also undermines the Eighth Circuit's reliance on NLRA precedent under which a party may withdraw from multi-party bargaining prior to commencement of negotiations on a new contract (Appendix A at 7a, *citing Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410-412 (1982)); NLRA agreements do expire and are replaced by new contracts. *See Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 26-27 (2d Cir. 1988); *Lumber Production Industrial Workers Local #1054 v. West Coast Industrial Relations Association*, 775 F.2d 1042, 1046 (9th Cir. 1985); *Proctor & Gamble Independent Union v. Proctor & Gamble Manufacturing Co.*, 312 F.2d 181, 184 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *Patterson Parchment Paper Co. v. International Brotherhood of Papermakers*, 191 F.2d 252 (3rd Cir. 1951), *cert. denied*, 342 U.S. 933 (1952). By contrast, RLA agreements continue indefinitely, subject only to amendment. Accordingly, service of proposals for changes in RLA agreements cannot be analogized to opening of negotiations on new NLRA agreements when existing agreements expire.

III. REQUIRING THE SOO TO NEGOTIATE NATIONALLY OVER ITS PROPOSED WITHDRAWAL FROM THE NATIONAL HEALTH AND WELFARE PLANS WOULD NOT INFRINGE UPON THE SOO'S RIGHTS UNDER SECTIONS 2 THIRD AND FOURTH OF THE RAILWAY LABOR ACT

The Eighth Circuit concluded that the rationale of *Atlantic Coast Line* and its progeny, as well as the requirement of Section 2 First of the RLA that carriers and unions exert every reasonable effort to make and maintain agreements, were irrelevant to the outcome of this case which, the court held, turned upon the Soo's rights under Section 2 Third of the RLA to designate its own representative for collective bargaining. Appendix A 5a-7a. The Court noted that the Unions recognized the Soo's rights under Section 2 Third, but concluded that the Unions' argument was nonetheless at odds with that provision. *Id.* at 7a. The Unions submit that this conclusion was in error and was based upon a misunderstanding of the Unions' position, as well as the nature of national handling.

The Court correctly found that the Unions recognized that the Soo has a statutory right to select its own bargaining representative; indeed, the Unions have consistently and explicitly made that point. The Unions' position was that the Soo was required to negotiate its proposal for its withdrawal from the national plans at the national bargaining table in conjunction with national bargaining over the national plans; the Unions explicitly stated that they did not care whether the Soo designated the National Carriers' Conference Committee as its representative, or whether it came to the national bargaining table as its own representative.[7] And, the Unions acknowledged that so long as the Soo participated in the national bargaining

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[7] *See* the Unions' responses to the District Court's inquiry on that subject, Joint Appendix at 229, 451, the Unions' opening brief to the court of appeals (at 28 n.18) and their reply brief (at 2-6).

and bargained in good faith, it could refuse to agree to every proposal for changes in the national plans and could bargain to impasse on its own proposal for its withdrawal from the national plans. At no time did the Unions insist that the Soo designate the NCCC, or anyone else, as its bargaining agent. *Id.*

The Eighth Circuit's conclusion to the contrary appears to be premised upon its confusing of the process of national handling with the manner in which that process has generally been conducted. The court began its decision with the observation that national handling "refers to the collective bargaining practice whereby railroads and unions give bargaining authority to multi-carrier and multi-union committees, agreeing in advance to be bound by a national agreement reached by the two committees." Appendix A at 2a n.1. However, the court cited no authority for that characterization of national handling, and no other decision which discusses national handling describes it as requiring the participants to forego the right to represent themselves.[8] Rather, all of those decisions discuss national handling as a process by which certain subjects, which must be addressed in negotiations throughout the industry, and for which uniform treatment has been deemed desirable by the parties, are negotiated nationally.[9]

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[8] The Eighth Circuit's assumption as to the conduct of national bargaining is also incorrect historically, for until the 1970s, the carriers were divided into three carrier conference committees. Those conference committees were the designated representatives of their member carriers and they, in turn, would select one spokesperson who would actually conduct the negotiations, but who had no power to bind the conference committees or their members.

[9] Indeed, the district court concluded (Appendix B at 18a; footnote omitted), the Unions submit correctly, that:

> "Soo's right to select its bargaining representative therefore does not resolve the question whether it is obligated to participate in national handling. That is, it is possible that Soo, even if it chose to represent itself, may have been required to partici-

The key component of national handling is not the identity of the parties' representatives, but rather the locus of bargaining,—*i.e.*, the national bargaining table as opposed to carrier by carrier bargaining. And, although the participants have generally found it convenient to bargain through national agents, there is nothing inherent in the nature of national handling which requires the designation of the same bargaining agents. *See*, note 8, *supra*. Accordingly, the Eighth Circuit began its analysis of this case with the erroneous assumption that requiring the Soo to participate in national handling would mean requiring it to designate the NCCC as its bargaining agent; and it was upon that erroneous assumption that the court discounted the Unions' assertions that they had no intention of dictating the Soo's choice of bargaining representative, and rejected the Union's basic argument.

The Unions therefore submit that the Eighth Circuit reached an incorrect result because its analysis began from an erroneous premise regarding the nature of national handling. The Unions further submit that resolution of this case does not require the interpretation or application of Section 2 Third of the RLA, and that the Soo's rights under that provision would not be infringed by an order requiring that it negotiate nationally over its proposed withdrawal from the national health and welfare plans, and that it continue to participate in national negotiations until it either obtains an agreement or reaches impasse on its proposed withdrawal from the plans.

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pate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO as well as with the NCCC."

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review and reverse the judgment of that court in *American Railway and Airway Supervisors Association, et al. v. Soo Line R.R., supra.*

Respectfully submitted,

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Date: March 13, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-5350

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, (DIVISION OF BRAC); BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (DIVISION OF BRAC); HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; and UNITED TRANSPORTATION UNION;

Appellants,

v.

SOO LINE RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 8, 1989

Filed: December 13, 1989

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

LAY, Chief Judge.

This is a suit seeking declaratory and injunctive relief to require national bargaining [1] over the proposed modification of health and welfare benefits between eleven rail unions and Soo Line Railroad Company. The district court [2] granted summary judgment in favor of the railroad, and the unions appeal. We affirm.

Background

In early 1984, the unions, pursuant to section 6 of the Railway Labor Act (RLA or the Act), 45 U.S.C. § 156 (1982), served notice on the railroad that they intended to request changes in pay rates, work rules, and benefits, including health and welfare plans, covering railroad employees. Since 1955, the parties have jointly subscribed to national, industry-wide health and welfare plans. Various modifications of these plans were made over the years

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[1] National bargaining, or "national handling" as it is called in the railroad industry, refers to the collective bargaining practice whereby railroads and unions give bargaining authority to multi-carrier and multi-union committees, agreeing in advance to be bound by a national agreement reached by the two committees.

[2] The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

through national bargaining agents.[3] In 1985, the three existing health and welfare plans covered approximately 320,000 active employees and some 9500 retired employees on 242 railroads.

When the unions requested the latest modifications, Soo refused to negotiate health and welfare matters on a national basis. Soo informed the unions that it intended to negotiate these matters locally, and that it intended to withdraw from the national plans and develop its own plans through self-insurance.

The unions insist that under the Act the railroad is obligated to participate in national bargaining over the proposed changes in the health and welfare plans. They argue that Soo may not even attempt to negotiate a withdrawal from the national plans without first serving a section 6 notice to negotiate a withdrawal from the national bargaining process itself.

The district court rejected this argument on the ground that national bargaining had not yet commenced, relying on cases interpreting the National Labor Relations Act (NLRA). *See, e.g., Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982).[4] The unions argue that NLRA case law does not apply, citing fundamental dif-

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[3] Generally the bargaining agents have been the Health and Welfare Committee of the Cooperating Railway Labor Organizations for the employees, and the National Carriers' Conference Committee for railroads. The various agreements reached by these negotiators were of unlimited duration but contained moratorium clauses which precluded changes over a period of time.

[4] *Bonanno Linen* held that the National Labor Relations Board (NLRB) could prevent an employer from withdrawing from a multiemployer bargaining unit once bargaining had commenced, notwithstanding an impasse in negotiations. The Court, however, acknowledged with approval the NLRB's policy of allowing unrestricted withdrawal *prior* to the commencement of bargaining, stating that such a policy "recognized the voluntary nature of multiemployer bargaining." 454 U.S. at 412.

ferences between the NLRA and the RLA. The unions contend that the district court erred in failing to recognize that whether national bargaining is obligatory under the RLA depends not upon whether such bargaining has commenced, but rather, on (1) the nature of the issue, and (2) the history of bargaining on that issue. *See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968).[5] The unions argue historical bargaining practice and the importance of the health and welfare coverage mandate continued national bargaining on the issue.[6]

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[5] The issue in *Atlantic Coast Line* was whether a union had breached its duty to bargain by refusing to negotiate with a multi-carrier representative. *See Atlantic Coast Line R.R. v. Brotherhood of R.R. Trainman*, 262 F. Supp. 177, 184-85 (D.D.C.), *rev'd*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). The lower court, relying on section 2 of the Act, held that the union was obligated to negotiate with the multi-carrier representative. *Id.* at 187-88. The court of appeals reversed on the ground that the particular issue at hand had traditionally been negotiated on a local, rather than national, level. 383 F.2d at 229. The court went on to state the following:

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.

Id.

[6] The union does not contend that a section 6 notice under the Act is necessary on the ground that it is a modification of the collective bargaining agreement to sever the health and welfare issue from negotiation of wages and working conditions which are still authorized for national bargaining. This complex question is not briefed and our holding does not consider such a contention.

The railroad counters that since a new round of national bargaining has not yet commenced, it is not obligated to bargain through a national representative. Compelling it to do so, the railroad contends, would contravene section 2 of the Act which provides each party the freedom to select its own bargaining representative. *See* 45 U.S.C. § 152 Third. The railroad argues that the right to select its own representative provides the correlative right to bargain on a local basis and not be bound by any national agreement to which it is not a party.

The unions insist the railroad merely confuses the issue in basing its argument on the basic statutory right to select its own representative. The unions acknowledge that right, but urge that unless the railroad negotiates its way out of national bargaining it must accept the agreement reached by the national negotiators.

Discussion

Whether it is dicta as the railroad argues or holding as the unions maintain, we are not convinced that the two-part test suggested in *Atlantic Coast Line* can be applied here. The unions are correct that the Act's mandate to "exert every reasonable effort to make and maintain agreements," *see* 45 U.S.C. § 152 First, imposes upon the railroad an affirmative duty to negotiate in good faith with the unions. *See, e.g., Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570. 574-75 (1971); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 714-25 (1945) (duty applies to grievances and major disputes). Repeating the district court's observation, however, we are aware of no decision that construes this duty to obligate the railroad to bargain for a national contract through a national bargaining representative. The unions' argument ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate.

The RLA clearly states that both carriers and employees have the right to designate their own representatives for bargaining:

> Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

45 U.S.C. § 152 Third. *See also* 45 U.S.C. § 152 Fourth ("Employees shall have right to organize and bargain collectively through representatives of their own choosing."). The Supreme Court has characterized this right to choose as the "essential foundation" of the Act:

> Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained.

Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 569 (1930). No existing agreement or statutory provision obligates the railroad to designate a national, multi-carrier representative to conduct its

negotiations. The railroad may bargain solely on its own behalf.[7] The unions appear to concede this and yet continue to argue as if it is not so.

The *Bonanno* line of cases recognize a limited exception to this basic right of choice in situations where one of the negotiating parties attempts to withdraw from multi-party bargaining after negotiations have begun. *See, e.g., Bonanno Linen*, 454 U.S. at 410-11 & n.5 (citing cases following this exception). Prior to the commencement of negotiations, the parties remain free to withdraw from their respective bargaining coalitions. *Id.* at 412. As the district court aptly pointed out, several of the cases cited by the unions in support of their argument can be read as applying these principles to bargaining under the RLA. *See American Ry. & Airway Supervisors Ass'n v. Soo Line R.R.*, 690 F. Supp. 802, 807 & n.6 (D. Minn. 1988) (citing *United Transp. Union v. Burlington Northern, Inc.*, 325 F. Supp. 1125, 1131 (D.D.C. 1971); *International Ass'n of Machinists & Aerospace Workers v. National Ry. Labor Conference*, 310 F. Supp. 905, 912 (D.D.C. 1970); *Chicago, Burlington & Quincy R.R. v. Railway Employees' Dept.*, 301 F. Supp. 603, 607 (D.D.C. 1969)); *accord Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 610-11 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971).

The unions argue that the *Bonanno Linen* principles are inapplicable here because of the unique nature of railroad labor contracts. Railroad labor contracts, unlike contracts under the NLRA, are perpetual in duration and are subject to modification only after predetermined moratorium periods. Thus, the unions apparently argue, the parties' obligations to participate in the national bargain-

[7] Until such bargaining is completed and the steps required by the Act exhausted, of course, Soo must continue to fulfill its obligations under the existing agreements. Indeed, the unions conceded at oral argument that Soo has done so. Soo is still paying premiums, and maintains the health and welfare coverage last agreed upon.

ing process continue indefinitely, or at least until the party desiring to withdraw serves notice and goes through the bargaining procedures mandated by the Act. We disagree. The clear import of the RLA is that each proposal for modification under section 6 initiates a new, distinct set of negotiations for which the parties are free to select new bargaining agents.[8] *See* 45 U.S.C. § 156. To conclude otherwise would, in effect, perpetually bind a carrier (or a union) to national representation once it agrees to such representation for a particular bargaining round. We agree with the district court that, as a policy matter, this would have the negative effect of discouraging parties from utilizing the national bargaining tool in the first place. *See Soo Line*, 690 F. Supp. at 807 n.8. In any event, we believe the Act speaks to the issue with adequate clarity, and conclude therefore that the *Bonanno Linen* principles are applicable here. Because a new round of national bargaining had not yet begun when Soo announced its intention to bargain locally, nothing prevents it from withdrawing from its national negotiating coalition.

We also cannot accept the union's argument that the railroad must serve section 6 notice of its intent to withdraw from national bargaining, and that it first must bargain over this "change." The selection of a bargaining agent is not a subject of mandatory bargaining under the Act. Nor is it a term in any existing agreement. It is a right reserved to the parties by the Act. The unions' argument that the railroad must serve notice and bargain over its decision to withdraw from national bargaining simply reads too much into the railroad's obligations under the Act and too little into its rights under the Act.

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[8] The past practice in the industry also supports this. Each time the unions have served section 6 notices on the carriers, they have requested the carriers to designated the NCCC or a similar group as their representative.

We emphasize that the right to designate a bargaining representative applies equally to both sides of the negotiating table; each side is obligated to "treat" with the other's designee. *See, e.g., Virginian Ry. v. System Federation No. 40*, 300 U.S. 51, 547-48 (1937). Indeed, the individual unions may seek to achieve significant bargaining power by coordinating their negotiating efforts. *See* Wagner, *Multi-Union Bargaining: A Legal Analysis*, 19 Lab. L.J. 731, 738 (1968) (discussing multi-union collective bargaining under the NLRA). The unions to some degree control their own destiny. If they splinter, as some already have done,[9] then separate agreements appear to be the order of the day. If the unions select a single representative, then that representative may lawfully insist that the same contract terms be applied to all unions that have given their prior approval.[10] In either case, the unions have the right to bargain for terms that match or exceed those of the current health and welfare plans. The railroad, of course, may in good faith attempt to bargain to secure a series of plans with individualized terms. Whether this bargaining will be objectively appraised as being in good faith will depend on many variables and uncertainties not at issue here.

Conclusion

In sum, we find that the railroad has no duty under the RLA to give notice to negotiate its withdrawal of a na-

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[9] Eight of Soo's nineteen unions have already independently negotiated for and agreed to new health and welfare plans.

[10] Cases interpreting the NLRA are instructive and support this point. *See General Electric Co. v. NLRB*, 412 F.2d 512, 519 (2d Cir. 1969) (upholding NLRB's determination that unions do not commit unfair labor practices by insisting that employer bargain with mixed-union negotiating committee); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44-45 (6th Cir. 1963) (same); *United States Pipe & Foundry Co. v. NLRB*, 298 F.2d 873, 877-78 (6th Cir.), *cert. denied*, 370 U.S. 919 (1962) (three unions may insist adamantly on identical terms in each of three separate labor contracts).

tional bargaining representative. The railroad has a statutory right to designate its own representative; it has no obligation to accept national bargaining and is not bound by national negotiations in which it chooses not to participate.[11] Correlative to this right, the railroad does have a duty to bargain with the representative or representatives so designated by the unions; it must bargain in good faith as to the terms and conditions of health and welfare coverage of the various employees represented by the union representatives.

For the reasons set forth herein, we find that the plaintiffs are not entitled to declaratory or injunctive relief. The judgment of the district court is therefore affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[11] The railroad concedes, however, that it does not argue over the situs of the negotiations, and is willing to negotiate in Washington, D.C. or another reasonable place chosen by union representatives.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-86-961

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, (DIVISION OF BRAC); BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (DIVISION OF BRAC); HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; and UNITED TRANSPORTATION UNION;

Plaintiffs,

vs.

SOO LINE RAILROAD COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

John O'B. Clarke, Jr., Esq., Highsaw & Mahoney, Suite 210, 1050 17th Street, N.W., Washington, D.C. 20036, appeared for plaintiffs.

Linzey D. Jones, Esq., Sidley & Austin, One First National Plaza, Chicago, IL 60603; and Patrick J. McPartland, Esq., and Barry McGrath, Esq., Soo Line Railroad Company, 105 Fifth Street South, Minneapolis, MN 55440; appeared for defendant.

Plaintiffs are rail labor organizations that brought this action on behalf of their members against defendant Soo Line Railroad Company (Soo) under the Railway Labor Act (the Act or RLA), 45 U.S.C. §§ 151 *et seq.* Plaintiffs seek to compel defendant to continue to participate in national employee benefit programs and to continue in national bargaining as to those programs. Jurisdiction is alleged pursuant to 28 U.S.C. § 1337(a). Plaintiffs seek both declaratory and injunctive relief. Soo filed a counterclaim, asserting that plaintiffs are violating the Act by refusing to negotiate directly with defendant over employee benefits and seeking declaratory and injunctive relief. Now before the court is Soo's motion to dismiss for failure to state a claim or, alternatively, for summary judgment. Soo also moves for summary judgment on its counterclaim.[1]

BACKGROUND

On this motion to dismiss or for summary judgment, the court views the facts in the light most favorable to plaintiffs. Since 1954, rail labor unions and rail carriers have

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[1] On January 14, 1988, the court ordered the parties to respond to six questions dealing with the factual background and legal issues. Each party then submitted a response and a memorandum in reply to the response of the other. These were received by February 16, 1988.

generally negotiated employee benefits on a national basis with designated national bargaining agents negotiating any changes. This is referred to as "national handling." When carriers, including Soo, have participated in national handling, they have ordinarily given a power of attorney to the National Carriers' Conference Committee (NCCC) to negotiate on their behalf. The rail labor unions have similarly designated one bargainng agent, such as the Health and Welfare Committee of the Cooperating Railway Labor Organizations (CRLO). These two entities would then bargain over the benefit plans and reach an agreement that would be binding on all participants.[2] Travelers' Insurance Company has issued the national health and welfare policies since 1955.

In early 1984, various rail unions served notices pursuant to 45 U.S.C. § 156 on a number of carriers, including Soo, proposing changes in wage rates, work rules, and benefits under the Travelers' health and welfare policies. The unions requested that each of the carriers designate the NCCC as its bargaining representative. Although it agreed to national handling of the proposals concerning wages and work rules, Soo refused national handling of health and welfare benefits, stating that it would negotiate those benefits "locally." Accordingly, Soo declined to grant its power of attorney to the NCCC with respect to these benefits, as it had done in the past. Soo advised the unions that it wished to negotiate these issues on its own behalf and that it intended to withdraw from the Travelers' policies and develop its own plans through self-insurance.

Soo states that it has now reached agreement with 8 of the 19 local unions representing its employees on self-

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[2] At least some of these agreements provided, however, that they are to be construed as separate agreements between the individual carriers and unions. *See, e.g.*, Agreement Between NCCC and Brotherhood of Railroad Signalmen Art. XIV, § 2(a) (Jan. 8, 1982) (Exhibit 33 to Affidavit of Charles W. Nelson).

insured plans that provide superior coverage.[3] Soo continues to pay premiums on the Travelers' policies for its employees whose unions have not agreed to the new plans. The organizations participating in national handling have reached agreement under which proposals are to be submitted to a "Special Committee" which will make nonbinding recommendations. In the meantime, benefits under the national health and welfare programs will be continued. If the recommendations of the Special Committee do not result in an agreement, those parties have the right to resume direct bargaining.

The Railway Labor Executives' Association (RLEA), of which the chief executive officers of plaintiffs are all members, brought an action identical to this one in the United States District Court for the District of Columbia in October 1985. The action was transferred to this district, but was dismissed by the Honorable Harry H. MacLaughlin on the ground that the RLEA lacked standing to bring the action. *Railway Labor Executives' Ass'n v. Soo Line R.R. Co.*, No. 4-86-379 (D. Minn. Dec. 24, 1986). In that action, Soo had moved alternatively to dismiss for failure to state a claim. In an extended footnote, the court stated in dicta that this argument also had "considerable merit." Slip op. at 23 n.12. By order dated January 27, 1987, the court deleted that footnote in response to a motion made pursuant to Fed. R. Civ. P. 59(e) by the RLEA. Plaintiffs filed this action on December 31, 1986, making the same claim and seeking the same relief. The case was assigned to this court; Judge MacLaughlin declined referral. Soo now moves to dismiss for failure to state a claim or, alternatively, for summary judgment.

DISCUSSION

Under the Act, both carriers and their employees have the duty "to exert every reasonable effort to make and

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[3] This constitutes only 10 percent of its employees, according to plaintiffs.

maintain agreements concerning rates of pay, rules, and working conditions" in order to avoid any interruption to commerce. 45 U.S.C. § 152 First. By giving notice pursuant to 45 U.S.C. § 156 ("Section 6 notice"), either party can propose a change in their agreement.[4] Under the Act, both carriers and employees have the right to designate their own representatives for bargaining:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives.

45 U.S.C. § 152 Third.

Plaintiffs allege that Soo has violated the Act by refusing to participate in national handling and by not bargaining over its attempt to withdraw from the national programs. Plaintiffs argue that national handling of the employee benefit plans, under the circumstances here, is obligatory under the Act. Plaintiffs rely heavily upon *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R. Co.*, 383 F.2d 225, 229 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968), which stated that "[w]hether [national handling is] obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." Soo argues that this statement was dicta; plaintiffs disagree. In plaintiffs' view, this case established that a case-by-case approach is appropriate and that national handling may be obligatory in some circumstances.

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[4] Labor agreements in the railway industry are usually of unlimited duration. They often contain "moratorium" clauses, however, that preclude proposals for change for limited periods. Declaration of Richard I. Kilroy para. 7.

Plaintiffs argue here that national handling is obligatory in view of the 34-year history of such handling and the circumstances surrounding employee benefits. Plaintiffs do not view defendant as perpetually bound to national handling; rather they state that "in order for the Soo to withdraw from national handling it must serve a separate Section 6 notice on that question and it must bargain with all of the parties involved in national handling before it can withdraw." Plaintiffs' Memorandum at 16.

Defendant Soo argues that this case is really about a party's right to designate its own representative for bargaining, as guaranteed by the Act. In its view, it simply decided not to designate the NCCC as its bargaining representative with respect to employee benefits. Soo asserts that the court should not rely upon the mere dicta of *Atlantic Coast Line* and argues that subsequent cases noting the dicta have all involved situations where one party began national handling and thereafter tried to withdraw. Here, by contrast, Soo argues that it selected local bargaining at the outset. As a policy matter, Soo contends that carriers will never agree to national handling if it necessarily becomes obligatory thereafter which, Soo suggests, plaintiffs' theory would require. Finally, even if the *Atlantic Coast Line* test were applicable, Soo argues that the subject of health and welfare benefits does not require uniform national handling.

With respect to its counterclaim, Soo argues that plaintiffs have violated the Act by refusing to negotiate with it on a local basis and by attempting to abrogate agreements already reached between it and some of the unions. Soo therefore seeks an order requiring plaintiffs' designated representatives to negotiate directly with it. Plaintiffs respond that they had no duty to negotiate directly with Soo because Soo has never served its own Section 6 notice proposing to withdraw from the national plans.

Two procedural aspects to bargaining may be distinguished. The first is who will represent the parties at the bargaining table, and the second is where it will take place. Soo focuses on the former, stressing its freedom to designate its representative and arguing that "[t]he situs of [the] negotiations is irrelevant." Defendant's Memorandum at 7 (Feb. 1, 1988). Plaintiffs stress the latter —whether bargaining will occur on a national or local level.

With respect to the first procedural aspect—choice of representative—the language of the Act explicitly guarantees each party's right to select its own representative "without interference, influence, or coercion." 45 U.S.C. § 152 Third. Under the Act, Soo therefore could not be required to designate the NCCC to negotiate on its behalf. Indeed, plaintiffs virtually acknowledged that fact by "respectfully requesting" Soo to designate the NCCC as its representative. *See, e.g.*, Letter of Brotherhood of Maintenance of Way Employes (April 2, 1984) (Exhibit 2 to Affidavit of Charles W. Nelson). Moreover, Soo cannot be required to bargain over its choice of representative because that right is protected by § 152 Third and because that topic would not appear to come within the language of § 152 First ("rates of pay, rules, and working conditions").

The second procedural aspect is more complicated. The parties have not provided a precise definition of "national handling." It appears that it would normally encompass centralized negotiations between two bargaining representatives, each of which represents more than one carrier or union, that result in a single agreement that applies to all of the participants. At times, however, it appears that a single carrier or union may bargain with the collective representative of the other side. *See* Affidavit of Charles W. Nelson, paragraph 21 (rail unions have sometimes bargained separately with the NCCC). If this latter situation is considered to be national han-

dling, then an organization's selection of its bargaining representative is independent from its choice whether to engage in national handling. Soo's right to select its bargaining representative therefore does not resolve the question whether it is obligated to participate in national handling. That is, it is possible that Soo, even if it chose to represent itself, may have been required to participate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO, as well as with the NCCC.[5]

The parties have devoted much of their efforts to debating the relevance of *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R. Co.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). In that case, the district court held that the Act authorized a group of carriers to insist upon national handling of negotiations over the issue of "crew consist." After examining the history of bargaining over that issue, the D.C. Circuit reversed, holding that national handling was not obligatory. The court explained:

> The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue.

Id. at 229. Plaintiffs argue that the *Atlantic Coast Line* ruling has been applied in a number of subsequent

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[5] That is, if other carriers had given their power of attorney to the NCCC.

decisions, citing *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 609 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *General Comm. of Adjustment GO-377, United Transp. Union v. Grand Trunk Western R.R. Co.*, No. 86-CV-70036-DT (E.D. Mich. June 12, 1986); *United Transp. Union v. Burlington N. Inc.*, 325 F. Supp. 1125, 1131 (D.D.C. 1971); *International Ass'n of Machinists & Aerospace Workers v. National Ry. Labor Conference*, 310 F. Supp. 905, 912 (D.D.C. 1970), *appeal dismissed*, 463 F.2d 872 (D.C. Cir. 1972); and *Chicago, Burlington & Quincy R.R. v. Railway Employes' Dept.*, 301 F. Supp. 603, 607 (D.D.C. 1969).

A review of these cases, however, reveals that courts have found national handling to be obligatory only after the parties had commenced national bargaining and then one attempted to withdraw or take action inconsistent with national handling.[6] For example, in *Chicago, Burlington & Quincy R.R.*, the court found national handling to be obligatory but explicitly relied upon the fact that national bargaining had already commenced:

> Having recognized the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees as the national representative of the carriers, the unions are not now free to compel the Burlington Railroad to bargain with them on a unilateral basis and thus break up the established multi-employer bargaining unit.

301 F. Supp. at 607. The factual situations in the remaining cases cited by plaintiffs are similar. *See, e.g., International Ass'n of Machinists & Aerospace Workers*, 310 F. Supp. at 912 ("Having begun on a national level,

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[6] For example, in two of the cases the issue was "whether, after national handling of a dispute has failed to produce an agreement, a strike against an individual carrier who has been part of the multi-employer bargaining unit is legal." *International Ass'n of Machinists & Aerospace Workers*, 310 F. Supp. at 911; *see also United Transp. Union*, 325 F. Supp. at 1125.

it is incumbent upon the parties to continue to deal on a national level even after the procedures of the Railway Labor Act have been exhausted.").

These rulings are consistent with the National Labor Relations Act (NLRA) principle that withdrawal from multi-employer bargaining units may not be restricted prior to the commencement of bargaining.[7] In *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410-11, 412 (1982), the Supreme Court explained:

> These rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to withdraw prior to the date set for negotiations of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. . . . The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdraw prior to bargaining.

Here, it is undisputed that Soo notified plaintiffs of its intention to bargain locally before the national bargaining commenced. As such, the present situation is distinguishable from those in the cases cited by plaintiffs. No decision has been identified that required a party to engage in national bargaining under similar circumstances. The Act itself fails to recognize or address the issue of national handling in any fashion whatsoever. This statutory silence, the lack of precedent imposing national handling under these circumstances, and the treatment of withdrawal from multiemployer bargain-

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[7] Plaintiffs contend that this principle cannot be applied in the Railway Labor Act context because of the unique nature of rail labor agreements. Although NLRA decisions are not binding precedent in this area, they may be instructive. *See, e.g., Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 574-75 (1971) (comparing duty to "maintain agreements" under RLA with duty to "bargain in good faith" under NLRA). Plaintiffs themselves have relied upon NLRA precedent. *See* Plaintiffs' Memorandum at 12-13 (Feb. 1, 1988).

ing units under the NLRA all indicate to the court that national handling should not be imposed here.[8]

Plaintiffs' contention that Soo failed to serve a required formal Section 6 notice concerning its proposal to develop its own health and welfare plans is unpersuasive. Although the precise requirements for a Section 6 notice are not clear, it appears that courts have approached such notices from a functional, rather than a merely technical, perspective. In *Pullman Co. v. Order of Ry. Conductors & Brakemen*, 316 F.2d 556, 562 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963), the court stated:

> We believe that a Section 6 notice is adequate if it informs a party of the purpose sought to be attained by the other party with sufficient definition to enable the former to understand the implications of the notice and proposed means adapted to the goal's attainment.

See also Brotherhood of R.R. Trainmen v. Southern Ry. Co., 393 F.2d 303, 309 (5th Cir. 1968). Under this standard, Soo's response to plaintiffs' Section 6 notices functionally served as a Section 6 notice itself. Plaintiffs do not claim, and could not reasonably claim, that they were unaware of Soo's proposal.

Even if the *Atlantic Coast Line* standard were applicable and the court could require national handling, plaintiffs have failed to show that national handling would be obligatory under these circumstances. *Atlantic Coast Line* states that the "practical appropriateness of mass bargaining" and the "historical experience" of bargaining on that issue should be considered. It is far from clear that national handling is the most practically appropriate man-

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[8] Moreover, as a policy matter, the imposition of obligatory national handling based merely on past participation in such bargaining would likely discourage parties from engaging in national handling in the first place. *See RLEA v. Soo Line R.R. Co.*, No. 4-86-379, slip op. at 22-23 (D. Minn. Dec. 24, 1986).

ner in which to handle bargaining over health and welfare benefits. It is undisputed that Soo has reached agreements with 8 of its 19 local unions that appear to provide benefits superior to those provided by the Travelers' plans. *See* Affidavits of Stuart J. Nelson, Edward W. Barsness, and Al Procopio, Jr. Although many carriers have participated in national handling and the Travelers' plans, the practice has not been uniform. Numerous carriers have declined to authorize the NCCC to negotiate on their behalf and a number of railroads have discontinued participation in the Travelers' policies. *See* Affidavit of Charles W. Nelson paras. 23-30. On the record before the court, Soo is entitled to summary judgment on plaintiffs' claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Although Soo's motion for summary judgment on plaintiffs' claims should be granted for the reasons stated, its motion for summary judgment on its counterclaim should be denied. The parties have largely focused on plaintiffs' claims to the exclusion of Soo's counterclaim. The merits of the counterclaim, if any, are not clear on the record provided. Since Soo has not shown that it is entitled to summary judgment, this motion should be denied.

The motion deadline in this case is now past; the case is theoretically ready for trial. Counsel should submit letters to the court by July 25, 1988 discussing how they propose the litigation should proceed in light of this opinion. Counsel should state their positions on whether the motion deadline should be extended; what issues of fact, if any, remain; and how the final issues in this case may best be resolved.

ORDER

Accordingly, based upon the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment is granted, and the complaint is dismissed.

2. Defendant's motion for summary judgment on its counterclaim is denied.

3. Counsel are to respond on the issues raised in the opinion's last paragraph by July 25, 1988.

Dated: July 6, 1988

/s/ Diana E. Murphy
DIANA E. MURPHY

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-86-961

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, (DIVISION OF BRAC); BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (DIVISION OF BRAC); HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; and UNITED TRANSPORTATION UNION;

Plaintiffs,

vs.

SOO LINE RAILROAD COMPANY,

Defendant.

ORDER FOR JUDGMENT

On July 6, 1988, the court ordered the parties to submit letters stating their positions as to how the litigation should proceed now that the complaint has been dismissed and only defendant's counterclaim remains. The responses of the parties to the order indicate that they are in substantial agreement on status matters.[1] Soo is currently engaged in negotiations with representatives of its employees over the establishment of an employee stock ownership plan which, if adopted, could resolve the subject matter of its counterclaim. The results of these negotiations should be known by January 1989. Both parties have suggested that Soo's counterclaim be dismissed without prejudice with leave to reinstate on or before January 15, 1989. Plaintiffs state that they desire to move for reconsideration of the court's order or, alternatively, for entry of final judgment on the complaint pursuant to Fed. R. Civ. P. 54(b). Soo does not oppose the entry of final judgment and in fact agrees that there is no just reason to delay plaintiff's efforts to obtain appellate review.

Fed. R. Civ. P. 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

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[1] The parties continue to differ on the merits of the dismissed complaint. Plaintiffs seek reconsideration or appellate review of the court's order dismissing their complaint. Since this case has already been extensively litigated in this court and has received extended judicial consideration, reconsideration here does not appear to be warranted.

In considering the possible entry of judgment under Rule 54(b), "a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). These administrative interests reflect "'the historic federal policy against piecemeal appeals.'" *Id.* (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956)). "Certifications under Rule 54(b) should neither be granted routinely nor as an accommodation to counsel." *Hardie v. Cotter & Co.*, 819 F.2d 181, 182 (8th Cir. 1987).

The court has carefully considered these precepts in the context of this case, but it appears there is no just reason for delay in the entry of final judgment on the complaint. Both parties agree to dismissal of Soo's counterclaim without prejudice. No claim will then remain to be adjudicated in this court. Although Soo would be entitled to reinstate its counterclaim on or before January 15, 1989, "[t]he mere presence of [a counterclaim] does not render a Rule 54(b) certification inappropriate." *Curtiss-Wright*, 446 U.S. at 9. Moreover, the complaint and the counterclaim raise distinct legal issues. "[N]o appellate court would [therefore] have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright*, 446 U.S. at 8 (footnote omitted). This litigation is important to the parties, and the history of the litigation makes it clear that the issues raised by plaintiffs' complaint will be appealed. This case is therefore unlike *United States Fire Ins. Co. v. Smith Barney, Harris Upham & Co.*, 724 F.2d 650 (8th Cir. 1983), for example. Finally, the remaining counterclaim will have been dismissed and those issues may never be litigated.

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's counterclaim is dismissed without prejudice, with leave to reinstate on or before January 15, 1989.

2. Final judgment shall be entered dismissing the complaint pursuant to Fed. R. Civ. P 54(b).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 28, 1988

/s/ Diana E. Murphy
DIANA E. MURPHY
United States District Judge

APPENDIX D

Statutes Relied Upon:

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Second, 45 U.S.C. § 152 Second

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

C. Section 2 Third, 45 U.S.C. § 152 Third

Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other: and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion

seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

D. Section 6, 45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX E

PETITIONER LABOR ORGANIZATIONS

American Railway & Airway Supervisors Association (Division of TCU);

Brotherhood of Locomotive Engineers;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Brotherhood of Maintenance of Way Employes;

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineer's Beneficial Association;

Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications International Union;

and United Transportation Union.



(2)

Supreme Court, U.S.
FILED
APR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1435

IN THE

Supreme Court of the United States

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, *ET AL.*
Petitioners,

v.

SOO LINE RAILROAD COMPANY
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the Railway Labor Act (RLA), particularly 45 USC § 152 Third, Soo Line Railroad Company (Soo) has a right to decline to become part of national, industry-wide bargaining leading to a national health and welfare agreement wherein other carriers in the railroad industry are represented by a negotiating committee of which Soo is not a member, when prior to national bargaining Soo announced its intention to represent itself locally to negotiate its own health and welfare agreements with its employees, and to not take part in national handling.

2. Whether designation of a national negotiating committee by Soo in previous rounds of collective bargaining to represent it in negotiating national health and welfare agreements requires it to bargain nationally on an industry-wide basis to secure permission from the unions to represent itself in negotiating local health and welfare agreements for Soo employees in a new round of collective bargaining.

LIST OF PARTIES

The caption and Appendix E of the petition for certoriari properly lists the parties. Pursuant to Supreme Court Rule 28.1, respondent's parent companies, subsidiaries and affiliates are Soo Line Corporation, Canadian Pacific Limited, and Indiana Harbor Belt Terminal Company.

TABLE OF CONTENTS

Page

Preliminary Statement 1

Restatement of the Case

A. The Legal Framework Governing Soo's Relationship With Its Employees 3

B. The Genesis of the Current Dispute Over the Negotiation of Health and Welfare Benefits 6

Reasons for Denying the Writ

A. The Court Below Correctly Applied Well-Settled Law that an Employer Under the RLA, as in Other Industries, May Withdraw From National Bargaining by Announcing Prior Thereto That it Intends to Bargain Locally With Representatives of its Own Employees 8

B. The Decisions Below are Not in Conflict With Any Other Decisions 13

Conclusion 15

TABLE OF AUTHORITIES

Cases:

American Railway and Airway Supervisors Ass'n, et al. v. Soo Line Railroad Company, 891 F.2d 675 (1989) 2

American Railway and Airway Supervisors Ass'n, et al. v. Soo Line Railroad Company, 690 F.Supp. 802 (1988) 2

Bonanno Linen Service v. NLRB, 454 U.S. 404 (1982) 8, 11, 13, 14

Brotherhood of Railroad Trainmen v. Atlantic Coastline RR, 383 F.2d 225 (D.C. Cir. 1967) 8, 10, 14

Chicago, Burington & Quincy Railroad v. Railway Employees' Dept., AFL-CIO, 301 F.Supp. 603 (D.D.C. 1969) 11

Delaware & Hudson Ry. Co. v. United Transportation Union, 450 F.2d 603 (D.C. Cir. 1971) 11
International Association of Machinists and Aerospace Workers v. National Railway Labor Conference, 310 F.Supp. 905 (D.D.C. 1970) 11
United Transportation Union v. Chicago & Illinois Midland Ry, C.D. Ill. No. 89-3014 (filed March 6, 1990) 3
United Transportation Union v. Illinois Central RR., N.D. Ill. No. 88-C-9607 (filed February 28, 1990) . 3, 12
United Transportation Union v. Duluth Mesabe & Iron Range Ry., D. Minn. Civil File No. 5-88-0178 (filed December 28, 1989) 3
United Transportation Union v. Grand Trunk Western RR., 6th Cir., No. 89-1523 (decided and filed February 21, 1990) 2, 12, 14

Statutes and Other Materials:

45 U.S.C. § 151 Sixth 3, 4
45 U.S.C. § 152 First 4, 14
45 U.S.C. § 152 Second 4
45 U.S.C. § 152 Third 3, 5
45 U.S.C. § 156 4
49 U.S.C. § 10706 (1980) 12
H.Conf. R.Rep. No. 96-1430, 96th Cong., 2d Session, 113-114 (1980) 12
Staggers Act, Public Law No. 96-448, Section 219 . . 12, 13
U.S. Code Cong. & Admin. News 1980, p. 3978 12

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RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Soo Line Railroad Company ("Soo") submits this brief in opposition to the petition for certiorari.

PRELIMINARY STATEMENT

The question presented here is whether Soo acted in accordance with the Railway Labor Act (RLA) in declining to designate the National Carriers Conference Committee (NCCC) as its representative in bargaining with the petitioning unions for the purpose of negotiating changes in the national health and welfare agreement, announcing instead, prior to the onset of such national bargaining, that Soo desired to represent itself in local negotiations with union representatives of its own employees for the purpose

of entering into health and welfare agreements between Soo and its employees. Petitioners have consistently taken the position that Soo could not enter into local bargaining without first obtaining their agreement to do so at the national bargaining table. Thus, the petitioning unions would have Soo bargain nationally with them, during the course of national bargaining with the NCCC, to secure their agreement to negotiate locally. Soo is not a member of the NCCC, but under petitioner's theory would have to sit at the national bargaining table to bargain over its decision to negotiate locally.

The United States Court of Appeals for the Eighth Circuit in *American Railway and Airway Supervisors Association, et al. v. Soo Line Railroad Company*, 891 F.2d 675 (1989) affirmed the decision of the United States District Court for the District of Minnesota, reported at 690 F.Supp. 802 (1988), in holding that Soo has no duty to give notice under the RLA to negotiate its withdrawal from national bargaining; has a statutory right to designate its own representative to bargain locally; and further, has no obligation to accept national bargaining and is not bound by national negotiations in which it chooses not to participate.

While the Eighth Circuit's opinion is recent, filed December 13, 1989, at least four courts have since reached the same conclusion relying on the Eighth Circuit rationale in the instant case.

The Sixth Circuit in *United Transportation Union v. Grand Trunk Western RR*, 6th Cir., No. 89-1523 (decided and filed February 21, 1990), attached as Appendix A, cited without discussion on page 9 of the certiorari petition, upheld the decision of the District Court for the Eastern District of Michigan, reported at 712 F.Supp. 107 (1989),

and applied the reasoning of the Eighth Circuit in the instant case holding that under Section 2 Third of the RLA, 45 U.S.C. § 152 Third[1], a railroad cannot be compelled to bargain nationally where it opts for individual, local bargaining before the start of negotiations, and to argue to the contrary ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate.

More recent district court decisions have followed Eighth Circuit and Sixth Circuit rationale. *United Transportation Union v. Chicago & Illinois Midland Ry.* C.D. Ill. No. 89-3014 (filed March 6, 1990), attached as Appendix B; *United Transportation Union v. Illinois Central RR*, N.D. Ill. No. 88-C-9607 filed February 28, 1990), attached as Appendix C; *United Transportation Union v. Duluth, Mesabe & Iron Range Ry.*, D. Minn. Civil File No. 5-88-0178 (filed December 28, 1989), attached as Appendix D.

Thus, all of the recent case authority from the lower courts in other circuits on these issues have followed the Eighth Circuit holding in the instant petition.

RESTATEMENT OF THE CASE

A.

The Legal Framework Governing Soo's Relationship With Its Employees.

At the risk of being too elementary, a brief description of the applicable provisions of the Railway Labor Act may assist the Court in focusing on the genesis of this litigation. Soo's relations with its employees are governed by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The Act

[1]Relevant statutes are reprinted in Appendix E hereto.

imposes upon both the carrier and its employees the obligation to make and maintain agreements through good faith bargaining. 45 U.S.C. § 152 First. Under the Act, either a railroad or its employees may initiate negotiations with respect to changes in "working conditions" by serving upon the other party a notice pursuant to Section 6 of the Act, 45 U.S.C. § 156, describing the changes sought. Upon service of a Section 6 notice, the parties confer in an attempt to resolve any disputed contractual changes in the notice. If the issues are not resolved in such conferences, either party is permitted to request the services of the National Mediation Board who will assist the parties in reaching an agreement. 45 U.S.C. § 156.

Under the RLA, both employees and carriers are guaranteed the right to select their own representatives to resolve disputes over proposed changes in existing contracts through collective bargaining. Section 2 Second, of the RLA, 45 U.S.C. § 152 Second, provides that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered and, if possible, decided, with all expedition, in conference *between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees thereof* interested in the dispute." (Emphasis added.)

The Act further defines "representative" as "any person or persons, labor union, organization, or corporation *designated either by a carrier* . . . or by its . . . employees, *to act for it or them.*" 45 U.S.C. § 151 Sixth. (Emphasis added.)

More specifically, Soo's right, and for that matter the right of petitioners, to select its own representative for such negotiations without intereference is preserved by Section 2 Third of the RLA:

> Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. . . . 45 U.S.C. § 152 Third.

Certain classes and crafts of Soo employees are members of, and are represented by, labor organizations in their negotiations with Soo. These negotiations are generally conducted by a General Chairman of each labor organization elected by the employee members of that union. Periodically, some of the General Chairmen defer to the national or international labor organization with which they are affiliated to bargain on an industry-wide basis. Except in those cases where the national or international labor organizations participate in negotiations, either with a specific railroad or on an industry-wide basis, the General Chairmen bargain for their members with Soo directly. (J.A. 134)[2]

The railroads may similarly elect to bargain directly on their own behalf or to be represented by a multi-railroad bargaining agent. This latter negotiation format, which has become known as "national handling," enables a number of railroads and their employees to reach a single agreement which then applies to all of the participants. When Soo has elected to participate in national handling, it has done so by giving a power of attorney to the National Carriers' Conference Committee ("NCCC") to negotiate on its behalf with respect to specific issues. (J.A. 136)

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[2]Reference to the Joint Appendix filed in Eighth Circuit No. 88-5350 in the instant case.

A railroad's designation of the NCCC as its bargaining representative with respect to a certain issue or issues, however, neither obligates it to participate in national handling with respect to other issues nor automatically authorizes the NCCC to represent it in subsequent national negotiations. Rather, for every set of negotiations, each railroad desiring to participate in national handling must specifically grant the NCCC power to act as its representative with respect to particular issues. (J.A. 137)

B.

The Genesis of the Current Dispute Over the Negotiation of Health and Welfare Benefits.

In January, 1984, local unions and General Committees representing Soo's employees each served separate and individual Section 6 notices on Soo seeking to negotiate changes in working conditions, including changes in the health and welfare benefits. In virtually every instance, the notice requested that Soo waive its right to conduct direct negotiations with the unions and requested it to authorize the NCCC to act for it in national bargaining. The notices indicated that, if Soo was not agreeable to such national handling, the locals would participate in a conference directly with Soo itself, as provided by the Railway Labor Act. (J.A. 147-149, 150-151)

Following receipt of these Section 6 notices, Soo advised the unions that it had chosen to bargain locally as its own representative with respect to the proposed changes in its employees' health and welfare benefits and, therefore, would not participate in national handling of these issues. Accordingly, Soo did not give its power of attorney to the

NCCC to negotiate on a national basis with respect to such benefits. (J.A. 149, 150)

When Soo advised the union representatives that it wished to negotiate health and welfare issues directly on its own behalf, the local union representatives conferred collectively with Soo and, in some cases, carried on further negotiations directly with Soo. As a result of these meetings, the company reached agreement with eight of the 19 local unions representing its employees on a Soo self-insured Health Care Plan, Dental Plan, Life Insurance and Accidental Death and Dismemberment Plan, and Early Retirement Major Medical Plan. These plans are now in effect and provide the covered employees with benefits significantly superior to those provided under the present national plans. (J.A. 47-48, 49-50, 51-52) Soo has offered to negotiate agreements with representatives of its other employees, proposing similar terms. (J.A. 152-154)

Soo invoked the services of National Mediation Board when unions refused to participate in local negotiations for the asserted reason that this litigation was pending. Notwithstanding this stalemate, the Company has continued coverage under the national policies for members of these unions and of the other unions with whom agreement has not been reached, until the parties reach agreement over Soo's health and welfare benefits or the parties exhaust their mandatory bargaining obligations under the RLA and are free to engage in self-help including the unilateral implementation by Soo of its health and welfare program. (J.A. 154-155)

REASONS FOR DENYING THE WRIT

A.

The Court Below Correctly Applied Well-Settled Law That an Employer Under the RLA, as in Other Industries, May Withdraw From National Bargaining by Announcing Prior Thereto That it Intends to Bargain Locally With Representatives of its Own Employees.

The decisions of the courts below were predicated in large measure on this Court's opinion in *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), which was decided some fifteen years *after* the *dicta* so heavily relied on by petitioners in *Brotherhood of Railroad Trainmen v. Atlantic Coastline RR*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). In *Bonanno*, this Court addressed the issue of withdrawal from multi-employer bargaining units under the National Labor Relations Act and reaffirmed the public policy interest against unwarranted restrictions on withdrawal from national bargaining. The Court noted and specifically approved the NLRB's guidelines that permit a party to decline to participate in an established multi-employer bargaining group of which it has been a member, so long as it acts before negotiations have commenced. Those guidelines neither force employers into multi-employer units nor erect barriers to withdraw prior to bargaining. 454 U.S. at 410-411, 412. The rationale of *Bonanno* has also been applied in all of the Railway Labor Act cases decided since the Eighth Circuit decision below, which are reproduced in the appendices to this brief.

Nothing in the Railway Labor Act indicates that either a railroad or its employees may be required to accept national handling against their will. Indeed in *Atlantic Coast Line*

the D.C. Circuit explicitly upheld a union's statutory right to resist national handling and reversed a trial court's decision that had required the union to accept such negotiations against its will. The Court of Appeals rejected this conclusion, stating that "[t]he Railway Labor Act does *not* universally and categorically compel a party to a dispute to accept national handling over its protest." 383 F.2d at 229 (Emphasis added).

By way of *dicta,* however, and without citation to either any prior judicial precedent or any provision of the RLA, the D.C. Circuit gratuitously and in a highly conclusory fashion opined that, under certain circumstances, national handling might be obligatory: "Whether it [national handling] is . . . obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." *Id.* at 229. On the strength of this *dicta,* petitioners claim that, because Soo has in the past voluntarily participated in national handling with respect to health and welfare benefits, it is automatically bound to do so in the future. Not only are petitioners attempting to stretch *dicta* into law, they are trying to stretch the meaning of *dicta* itself. Stretching mere *dicta* to such lengths would not only eliminate the statutory right that both railroads and their employees enjoy to choose freely their own bargaining representatives to bargain either nationally or locally, but it would also be contrary to sound labor relations policy. Moreover, such a rule would require the courts to evaluate the relative benefits and costs of particular bargaining procedures and to prescribe the most efficient method for negotiating a specific substantive issue, exercises the courts are ill-equipped to perform.

Any attempt to restrict the right of an employer or a union to select its own negotiating representative on the basis of the way negotiations had been conducted in the past is clearly bad labor policy. While national handling of labor disputes may be beneficial in helping to achieve peaceful settlements where both an employer and the representative of its employees consent to such handling, the use of this device would be discouraged if either an employer or a union could be bound perpetually to such an arrangement merely by virtue of having participated in national handling in the past. The resulting disincentive to ever agree to national handling would be particularly severe if rail carriers could be forced to participate in such multi-railroad bargaining where, as here, they have explicitly declined such participation *long before* bargaining in fact commenced. No one would benefit from such a restriction of bargaining choices — not the railroads, not the unions, and particularly not the public.

Clearly the *dicta* relied on by petitioners in *Atlantic Coast Line*, was not a matter for decision, since the circumstances under which railroads or their employees could be deprived of their right to decline to engage in national handling was not an issue before the court. Indeed, in that case the court explicitly upheld the right of the union to resist participation in national handling. Subsequent cases under the RLA that have noted the D.C. Circuit's *dicta* and have forced a party to participate in national handling have all involved situations where the party had waived its statutory right to insist on individual local negotiations and not situations, as in the instant case, where a carrier notified its unions in a timely fashion that it would represent itself in local negotiations over newly-served Section 6 notices.

For example, in *Chicago, Burlington & Quincy Railroad v. Railway Employees' Dept., AFL-CIO*, 301 F.Supp. 603 (D.D.C. 1969) (*"CB&Q"*), the court required rail unions to continue to participate in national handling. However, in *CB&Q* national negotiations had already commenced, and the unions were already participating in those national negotiations with CB&Q's national, multi-railroad agent. Only in the midst of those negotiations did the union attempt to seek a better deal by trying to force the CB&Q to bargain with it individually. The district court concluded that: "Having recognized . . . the national representative of the carriers, the unions are not now free to compel the Burlington Railroad to bargain with them on a unilateral basis and thus break up the established multi-employer bargaining unit." *Id.* at 607. This holding is no more than an application of the general rule, as described by the Court in *Bonanno Linen,* that a party to multi-employer bargaining may not generally withdraw after negotiations have commenced.

Similarly, all of the remaining precedents in the District of Columbia Circuit relied on by petitioners and citing the earlier *dicta* have involved situations, unlike the one in this case, in which negotiations had already commenced on a national level, and one of the parties took actions inconsistent with such handling. In *International Association of Machinists and Aerospace Workers v. National Railway Labor Conference,* 310 F.Supp. 905 (D.D.C. 1970), the court held only that, once negotiations had begun on a national level, a union could not attempt to coerce individual agreements by striking selectively fewer than all the railroads participating in such bargaining even after national negotiations had reached an impasse. *Id.* at 912-913. In *Delaware & Hudson Ry. Co. v. United Transporta-*

tion Union, 450 F.2d 603 (D.C. Cir. 1971) the court held that a union *could* selectively strike fewer than all the members of a multi-railroad bargaining group upon reaching an impasse in national negotiations so long as the strike was not intended to coerce individual agreements, but was aimed at a national agreement.

The gratuitous remarks in the petition asserting that the denial of certiorari would increase labor strife, would destabilize existing national agreements and would impede negotiations in the future leading to a disruption in commerce, are wholly unfounded and without support in the railroad industry or other industries, for that matter. As the Court well knows, the railroad industry has been deregulated after passage of the Staggers Rail Act of 1980. In that legislation, the Congress phased out collective rate making and required railroad rates to be individually set and further contemplated that railroads would have greater individual freedom to determine their own freight charge and cost structures, including significant labor costs. Public Law No. 96-448, Section 219, codified at 49 U.S.C. § 10706 (1980). See also, H.Conf. R.Rep. No. 96-1430, 96th Cong., 2d Session, 113-114 (1980), U.S. Code Cong. & Admin. News 1980, p. 3978. Thus, requiring national bargaining would be inconsistent not only with the RLA but with the goals of the Staggers Act since individualized pricing based on carrier specific costs is the cornerstone of the Act. *United Transportation Union v. Grand Trunk Western RR, supra,* 712 F.Supp. 107, 111-112 (E.D. Mich. 1989), *aff'd,* 6th Cir. No. 89-1523 (decided and filed February 21, 1990). The legislative framework in this regard is succinctly stated in *United Transportation Union v. Illinois Central RR,* N.D. 111 No. 88-C-9607 (filed February 28, 1990):

> Prior to the enactment of the Staggers Act, railroads could increase their freight rates collectively. After the Staggers Act went into effect, railroads were required to set their rates individually in order to foster a more competitive environment. To maintain this competitive environment, carriers need greater freedom to determine their own cost structures, especially labor costs. If railroads could be compelled to participate in national negotiations, they would lose much of this freedom. The ability to freely engage in local negotiations is perhaps even more important to a railroad such as Illinois Central, which seeks to obtain labor agreements that are more consistent with its current railroad operations. (Citations omitted.) Apx. p. A-26-27.

Soo and other railroads have been bargaining locally in keeping with that policy. (J.A. 144-147) As a relatively small regional railroad, it is critical for Soo to bargain locally to operate effectively in its competitive environment.

Under the present legislative framework in the RLA and Staggers Act, as well as well-reasoned case authority, the Eighth Circuit decision in the instant petition need not be reviewed.

B.

The Decisions Below are Not in Conflict With Any Other Decisions.

To respondent's knowledge, all case authority under the RLA since this Court's decision in *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982) has uniformly held that an employer under the Railway Labor Act may withdraw from national bargaining by announcing prior to such bargaining that it intends to bargain locally with representa-

tives of its own employees. These decisions are of recent vintage and have already been cited in the preliminary statement of this brief in opposition. They have also been set out in Appendices A, B, C, and D hereto. As stated by the Sixth Circuit in *United Transportation Union v. Grand Truck Western RR*, 6th Cir., No. 89-1523 (decided and filed February 21, 1990), and quoting from the Eighth Circuit decision to which certiorari is here sought:

> We are aware of no decision that construes this duty [to 'exert every reasonable effort to make and maintain agreements,' 45 U.S.C. § 152 First] to obligate the railroad to bargain for a national contract through a national bargaining representative. The unions' argument ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate. Apx. p. A-3-4.

The *dicta* of the 1967 District of Columbia Circuit *Atlantic Coastline* decision upon which petitioners placed so much stock and the decisions citing that *dicta*, on which petitioners also rely, do not involve *holdings* contrary to the post *Bonanno* cases included in the Appendices to this brief in opposition, as well as the Eighth Circuit decision in this case.

In sum, petitioners cannot point to any direct conflict with the decisions below, and their effort to generate a conflict through the *Atlantic Coastline dicta* is wholly unavailing. Simply stated, *all* of the authority deciding the issues resolved in the district court and the court of appeals below have consistently followed those decisions.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-1523
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United Transportation Union,
Plaintiff-Appellant,

v.

Grand Trunk Western Railroad Co.,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 21, 1990

Before: NELSON and BOGGS, Circuit Judges, and BERTELSMAN, District Judge.*

PER CURIAM. The plaintiff in this case, the United Transportation Union, brought an action for declaratory and injunctive relief seeking to compel the defendant, Grand Trunk Western Railroad Company, to participate in national multi-employer collective bargaining as opposed to individual bargaining. The district court granted summary judgment for the defendant, *United Transp. Union*

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

v. Grand Trunk W. R.R. Co., 712 F.Supp. 107 (E.D. Mich. 1989) (Zatkoff, J.). We agree with the district court's decision, which finds support in a subsequent decision by the Court of Appeals for the Eighth Circuit.

I.

Defendant Grand Trunk, a small Class I railroad, has approximately 943 miles of track in Indiana, Illinois, Michigan, and Ohio. Its employees are represented by the plaintiff union. Although it had engaged in national multi-employer bargaining in the past, Grand Trunk decided not to do so in the round of bargaining scheduled for 1988. On April 4, 1988 — before bargaining began — Grand Trunk notified the union that "the carrier intends to conduct negotiations in connection with this notice on its own behalf. GTW is not authorizing a national conference committee to represent us in these negotiations." This lawsuit followed.

The district court held that nothing in the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, required the railroad to engage in national bargaining. The court observed that the cases upon which the union relied held only that a railroad could not withdraw from national bargaining once it had commenced. *United Transp. Union*, 712 F.Supp. at 111. The court also noted that an argument similar to the union's had been rejected in *American Railway and Airway Supervisors Association v. Soo Line Railroad*, 690 F.Supp. 802 (D. Minn. 1988). That decision has since been affirmed by the Court of Appeals for the Eighth Circuit. *American Ry. and Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989) (*"Soo Line"*).

II.

In the present appeal the union urges that the railroad must engage in national, multi-employer bargaining if: (1) the issues are practically suited for national bargaining; and (2) such issues have traditionally been resolved through multi-employer bargaining. The union relies on *dicta* to that effect in *Brotherhood of Railroad Trainmen v. Atlantic Coastline Railroad*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968).

We find no authority for the union's position in the Railway Labor Act. The Act does, to be sure, require the parties to "exert every reasonable effort to make and maintain agreements," 45 U.S.C. § 152, First, and requires the railroad to negotiate in good faith. *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 574-75 (1971). But the Act expressly preserves each party's right to choose its own bargaining representative:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." 45 U.S.C. § 152, Third.

Relying on the latter section, the Eighth Circuit's *Soo Line* opinion rejects an argument identical to that made by the union here:

> "we are aware of no decision that construes this duty to obligate the railroad to bargain for a national contract through a national bargaining representative. The union's argument ignores the statutory right of

each party to designate a representative with whom the other party's representative must negotiate." *Soo Line*, 891 F.2d at 677-78.

A narrow exception to the freedom of choice rule exists "where one of the negotiating parties attempts to withdraw from multi-party bargaining after negotiations have begun." *Soo Line*, 891 F.2d at 678, citing a case under the National Labor Relations Act, *Charles D. Bonanno Linen Service Inc. v. NLRB*, 454 U.S. 404, 410-11 and n.5 (1982). Here, however, the union does not deny that Grand Trunk announced its intention before bargaining began. No court of appeals has compelled national bargaining where a party opted for individual bargaining before the start of negotiations. For us to do so would be to fly in the teeth of the statute.

Accordingly, and for the reasons stated in Judge Zatkoff's opinion, 712 F.Supp. 107, the judgment of the district court is AFFIRMED.

APPENDIX B

No. 89-3014

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS—
SPRINGFIELD DIVISION

UNITED TRANSPORTATION UNION,
Plaintiff.

v.

CHICAGO & ILLINOIS MIDLAND
RAILWAY COMPANY,
Defendant.

OPINION

RICHARD MILLS, District Judge:

At issue is whether the Defendant railroad is required to engage in nationwide, multi-employer collective bargaining or whether the railroad can bargain on its own behalf at the local level. We find that the Chicago & Illinois Midland Railway Company is not required to engage in nationwide handling of the wage and rules proposals that are in dispute.

This cause is before the Court on Defendant's motion to dismiss or in the alternative for summary judgment. Also before the Court is Plaintiff's motion for summary judgment. (As both sides have submitted affidavits and other documents in support of their respective motions, the Court will treat Defendant's motion as a motion for summary judgment.) In addition, Defendant has filed a counterclaim seeking declaratory and injunctive relief.

Thus, Defendant's motion for summary judgment on

Plaintiff's complaint will be allowed and Plaintiff's motion for summary judgment will be denied. Furthermore, summary judgment will be entered in favor of Defendant on its counterclaim.

I. Facts

Defendant Chicago & Illinois Midland Railway Company (C&IM) is a Class 2 railroad incorporated in Illinois. C&IM owns approximately 97 miles of mainline track and a lesser amount of side track in the five Illinois counties of Christian, Sangamon, Menard, Mason, and Tazewell. The railroad has 177 active employees, 18 of which are represented by the United Transportation Union (UTU). C&IM provides common carrier service by railroad but is primarily engaged in hauling coal.

Plaintiff UTU is an unincorporated association operating as a labor union. UTU represents railroad industry employees throughout the United States and Canada. The crafts represented by UTU are firemen, conductors, brakemen, yardmen, yardmasters, and some engineers. UTU is comprised of three organizational levels: (1) the international; (2) over 300 general committees of adjustment; and (3) approximately 800 locals.

On May 18, 1988, C&IM served bargaining notices pursuant to §6 of the Railway Labor Act, 45 U.S.C. §156. Under §6 of the RLA, a party to a railroad collective bargaining agreement who desires a change in the terms of the agreement must serve written notice of the desired change on the other party to the agreement. UTU served §6 notices on July 25, 1988.

Thereafter, the parties met several times to discuss wage and rules issues. In a meeting on October 13, 1988, UTU

Vice President Cliff Bryant stated that the §6 notices belonged in national handling. No further meetings were held.

Plaintiff filed its complaint on January 18, 1989. The complaint alleges that part of the obligation of the parties under §2 First of the RLA, 45 U.S.C. §152 First, is to handle §6 notices nationally where the historical methodology of handling and practical appropriateness of mass bargaining indicate national handling is appropriate and one of the parties insists on national handling. Thus, Plaintiff requests that the Court grant it declaratory and permanent injunctive relief ordering Defendant to negotiate UTU's July 25, 1988, §6 notice on a national basis. To accomplish this, Plaintiff requests that the Court issue an injunction directing Defendant to give its power of attorney to negotiate to the National Railway Labor Conference.

Defendant filed a counterclaim on March 3, 1989. The counterclaim alleges that Defendant is not required to engage in national handling and further alleges that Plaintiff's attempt to force Defendant to negotiate nationally is a violation of the Railway Labor Act. Defendant seeks a judgment declaring that C&IM has the unilateral right to select its representative for purposes of negotiating §6 notices; that C&IM is not required to bargain over its choice of representative for contract negotiations; that UTU's attempts to force C&IM to negotiate on a national basis violate the Railway Labor Act; and declaring that the refusal of UTU to negotiate directly with C&IM on a local basis violates the Railway Labor Act. C&IM also seeks an injunction requiring UTU to participate in good faith negotiations with C&IM over the terms and conditions of the 1988 §6 notices.

II. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Nevertheless, the rule is also well established that the mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it upon whom the *onus of proof is imposed.*" *Id.* at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Applying this standard, the Court now turns to the case at bar.

III. — Analysis

Disposition of these cross motions for summary judgment hinges on which of two competing interpretations of a statute the Court accepts. C&IM's relations with its employees are governed by, *inter alia*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Under the RLA, a carrier and its employees have the duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes.

. . ." 45 U.S.C. § 152 First. Either party can begin negotiations to change wage, rules, or working condition agreements by serving a notice pursuant to § 6 of the RLA, 45 U.S.C. § 156, on the other party. The carrier and its employees are then required to confer in an attempt to resolve any dispute arising out of the § 6 notices. Furthermore, both the carrier and its employees have the right to select their own representative to resolve disputes, without interference, influence or coercion by the other party. 45 U.S.C. §§ 152 Second, 151 Sixth, 152 Third.

A.

Plaintiff's Position

Plaintiff asserts that the Railway Labor Act and relevant case law require national handling of certain railway labor disputes. To support this contention Plaintiff relies almost entirely on a line of cases decided by the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia.

The earliest of the cases on which Plaintiff relies is *Brotherhood of Railroad Trainmen v. Atlantic Coastline R.R.,* 383 F.2d 225 (D.C. Cir. 1967), *cert. denied,* 389 U.S. 1047 (1068). In that case, the parties were involved in a dispute over the makeup of yard and road crews. The plaintiff served identical § 6 notices on approximately 80 carriers. Those carriers, one of which was the defendant, served their own § 6 notices on the plaintiff.

The union and various carriers began to negotiate on a local basis. Although the carriers requested that the dispute be referred to national handling if the local negotiations broke down, the union refused from the outset.

Local negotiations did break down and the parties invoked the services of the National Mediation Board. The carriers requested that mass mediation be scheduled but instead the board docketed each dispute separately.

Subsequently, several carriers, including the Atlantic Coastline R.R., filed suit in the District Court for the District of Columbia seeking declaratory and injunctive relief. The defendants asserted, *inter alia*, that the union breached a statutory obligation by refusing the request for national handling. The district court ultimately held that the RLA authorized the carriers to demand national handling.

The United States Court of Appeals for the District of Columbia Circuit reversed the district court but did so on the basis that the facts of the particular case did not warrant a finding that the carrier could insist on national handling. The Court went on to state, however:

> The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.

Id. at 229. The last quoted sentence is the language on which Plaintiff's entire case is based.

Atlantic Coastline has been cited in several other cases from the D.C. Court of Appeals and the District Court for the District of Columbia. *Delaware & Hudson Ry. Co. v. UTU*, 450 F.2d 603 (D.C. Cir. 1971), involved an attempt by 170 carriers to enjoin the union from conducting a selective strike against fewer than all of the carriers. Although

the court found that the union did have the right to conduct selective strikes, the court cited *Atlantic Coastline* for the proposition that national handling may be obligatory.

In *Chicago, Burlington & Quincy R.R. v. Railway Employee's Department,* 301 F. Supp. 603, 607 (D.C.D.C. 1969), the District Court for the District of Columbia also followed *Atlantic Coastline* and held that national handling was required.

Chicago, Burlington & Quincy involved a dispute over "contracting out" or the subcontracting of work. The court found that the subject matter of the dispute was one which had been handled, historically, on a multi-employer basis and the issue was not unique to the union's dealing with any specific carrier. *Id.* Thus, the court held that both the practical appropriateness of mass bargaining and the historical experience in handling the issue in the past made national handling of the matter obligatory. *Id.*

In *UTU v. Burlington Northern, Inc.*, 325 F. Supp. 1125, 1131 (D.C.D.C. 1971), the District Court for the District of Columbia again relied on *Atlantic Coastline* in finding that a dispute was subject to obligatory national handling. That case involved a disagreement over whether freight and yard diesel locomotives would be manned with firemen. The court, on the strength of *Atlantic Coastline,* found that negotiations and past agreements concerning the firemen manning dispute indicated a clear acceptance by the parties of national handling. The court further found that the issue was uniquely appropriate for general national standards. Thus, the court held that the historical experience and practical appropriateness of mass bargaining mandated a finding that national handling was obligatory.

The final case on which Plaintiff relies is *General Com-*

mittee of Adjustment v. Grand Trunk Western R.R. Co. (E.D. Mich. June 12, 1986). Again the court relied on *Atlantic Coastline* and found that the dispute was subject to national handling.

B.

Defendant's Position

Defendant asserts that it is not required to participate in national handling for three reasons. First, Defendant asserts that the language of the Railway Labor Act itself mandates a finding that national handling is not obligatory. Second, Defendant argues that the analogous National Labor Relations Act has never been interpreted as restricting the right of employers or their employees to decline to participate in multi-employer bargaining. Third, Defendant contends that the cases on which Plaintiff relies are distinguishable because they all involve a situation where one party commences national negotiations and then attempts to withdraw.

Defendant's argument based on the language of the RLA is rather simple. Under the RLA, both employees and carriers are guaranteed the right to select their own representatives to resolve disputes over proposed changes in existing agreements through collective bargaining. 45 U.S.C. §§ 151 Sixth, 152 Second. The Act expressly prohibits either party from attempting to coerce the other in its choice of a bargaining representative. 45 U.S.C. § 152 Third. Nowhere does the Act require that a party must engage in national handling of any dispute. Thus, Defendant asserts, national handling of a dispute is completely voluntary by the parties.

Defendant's second argument is based on case law inter-

preting the National Labor Relations Act. Defendant asserts that national handling under the RLA is similar to multi-employer bargaining under the NLRA. Defendant further asserts that it is well established under the NLRA that "[m]utual consent . . . is a basic ingredient necessary to support the appropriateness of a multi-employer bargaining unit." *Andes Fruit Co.*, 124 N.L.R.B. 781, 783 (1959). Thus, by analogy, Defendant argues that mutual consent is necessary to support national handling under the Railway Labor Act.

As its third attack on Plaintiff's position, Defendant attempts to distinguish the line of cases on which Plaintiff relies. Defendant asserts that the cases cited by Plaintiff are all cases in which a party commenced national handling and then attempted to withdraw and engage in local negotiations or took other action inconsistent with national handling. Defendant asserts that it informed Plaintiff from the outset that it intended to bargain on its own behalf on a local basis and that Plaintiff virtually ignores the only reported case addressing such a situation, *American Railway and Airway Supervisors Association v. Soo Line R.R. Co.*, 690 F. Supp. 802 (D. Minn. 1988).

In *Soo Line*, the railroad notified the unions of its intention to bargain locally on its own behalf before national negotiations began. The district court noted that the line of cases on which the plaintiff relied — the same line of cases on which UTU relies — were all cases in which one of the parties commenced national bargaining and then later attempted to withdraw. *Soo Line*, 690 F. Supp. at 807. The district court noted that the statutory silence on the issue of national handling, the lack of precedent imposing national handling where one party declines from the outset,

and the treatment of national handling under the NLRA all indicated that national handling should not be imposed. *Id.*

During the pendency of the case in this Court, the United States Court of Appeals for the Eighth Circuit decided the *Soo Line* appeal. *American Railway and Airway Supervisors Association v. Soo Line R.R. Co.*, 1989 U.S. App. Lexis 18953 (8th Cir. Dec. 13, 1989). The Eighth Circuit repeated the district court's observation that no reported decision construes the duty to exert every effort to make and maintain agreements as obligating a railroad to bargain for a national contract through a national bargaining representative, at least where national handling has not yet begun. The court further observed that the union's argument to the contrary ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate.

IV.

Ruling

We find that Defendant C&IM is not required to engage in national handling of the wage and rules proposals in dispute. To hold otherwise would be to add a provision to the RLA that Congress did not see fit to include. That is not the function of this federal trial court.

Plaintiff relies in large part on *Atlantic Coastline* and its progeny, a line of cases decided by the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. Those cases state that national handling is obligatory if the practical appropriateness of mass bargaining and the historical experience in handling similar national movements so indicate.

The Court is at once struck by the lack of citation to authority that accompanies these statements in the cases on which Plaintiff relies. The question arises where those courts find the two factors that Plaintiff alleges mandate a finding that national handling is required. Certainly, nothing in the statute requires the Court to look at those two factors. The RLA does not even mention national handling. The only conclusion that can be reached — or at least the conclusion that this Court reaches — is that the courts that decided the cases on which Plaintiff relies made the factors of practical appropriateness and historical experience out of whole cloth. That is something that this Court is unwilling to do. We must respectfully disagree with *Atlantic Coastline* and its progeny.

Our holding is not without support in the case law. The Court has already discussed the holding of *American Railway and Airway Supervisors Association v. Soo Line R.R. Co.*, 1989 U.S. App. Lexis 18953 (8th Cir. Dec. 13, 1989). That case held that a railroad has a statutory right to designate its own representative, that the railroad had no obligation to accept national bargaining, and that the railroad was not bound by national negotiations in which it chose not to participate.

Similarly, in *UTU v. Grand Trunk Western R.R. Co.*, 712 F. Supp. 107 (E.D. Mich. 1989), the court considered a situation in which the plaintiff union sought to compel a railroad to continue to participate in national bargaining as the railroad had in past years. The court held that national handling was not required, at least where the railroad notified the union of its intention to bargain locally before national handling commenced. *Id.* at 111.

Our holding in this case is also backed up by relevant

case law interpreting the National Labor Relations Act. We recognize, of course, that cases decided under the NLRA are not binding precedent for cases decided under the Railway Labor Act. Nor can the NLRA be imported wholesale into the railway labor arena. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). National handling as that term is used with reference to the RLA, however, is similar to multi-employer bargaining under the NLRA. Thus, cases interpreting the NLRA offer helpful instruction.

The NLRA is not interpreted as restricting the rights of employers or their employees to decline to participate in multi-employer bargaining, even where such bargaining has been conducted in the past. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410-12 (1981). Under the NLRA, "[m]utual consent . . . is a basic ingredient necessary to support the appropriateness of a multi-employer bargaining unit." *Andes Fruit Co.*, 124 NLRB. 781. 783 (1959). Thus, under the NLRA, a party may withdraw from a multi-employer bargaining unit at any time up to the start of negotiations. *Publishers' Association of New York City v. NLRB*, 364 F.2d 293 (2d Cir. 1966). Even after bargaining has begun, a party may withdraw if there is mutual consent or unusual circumstances. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. at 411. We find that these cases support our holding that national handling under the RLA is not mandatory at least where, as here, one party refuses to participate from the outset.

V.

Defendant's Counterclaim

In addition to defending against Defendant's motion for summary judgment on its complaint, Defendant has filed

a counterclaim. Defendant's counterclaim asserts that it has the unilateral right to select its representative for the purpose of negotiating the 1988 §6 notices, that it is not required to bargain over its choice of representative, and that the efforts of Plaintiff to force Defendant to give its power of attorney to negotiate to the NRLC violates the terms of the Railway Labor Act. Defendant further asserts that Plaintiff's refusal to bargain with it at the local level violates the terms of the RLA and that Plaintiff should be required to participate in good faith negotiations with C&IM over the terms and conditions of the 1988 §6 notices. We agree with each of Defendant's assertions and summary judgment will be granted in Defendant's favor on its counterclaim.

A.

Selection of Representative

Defendant asserts that it has the unilateral right to select its bargaining representative, that it is not required to bargain over its choice of representative, and that Plaintiff's attempts to force Defendant to give its power of attorney to negotiate to the NRLC are a violation of the Railway Labor Act. Based on the clear wording of the statute we find Defendant to be correct.

Pursuant to §2 Third of the RLA, 45 U.S.C. §152 Third, "[r]epresentatives . . . shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." This language unequivocally establishes that Defendant has the right to select its own representative and it is not required

to bargain over its choice of a representative. To require Defendant to bargain over its choice of representative would be to run afoul of the statute's mandate that a party be able to choose its own representative without interference or influence from the other party.

Similarly, in order for this Court to grant Plaintiff the relief requested and order Defendant to give its power of attorney to negotiate to the National Railway Labor Conference, we would have to pretend as though 45 U.S.C. §152 Third did not exist. Ordering Defendant to give its power of attorney to the NLRC would be tantamount to aiding Plaintiff in a violation of the Railway Labor Act. This we are unwilling to do.

Plaintiff asserts that it does not intend to interfere with Defendant's choice of representative and Defendant is free to choose any representative it desires. Plaintiff further asserts, however, that Defendant is required to engage in national handling and the only method of engaging in national handling of which Plaintiff is aware is for Defendant to give its power of attorney to negotiate to the NRLC. Thus, Plaintiff asks that the Court order Defendant to give its power of attorney to the NRLC.

Plaintiff's argument reminds us of Henry Ford's statement to the effect that a purchaser of a Model T could have any color he chose — so long as it was black. It hardly needs to be said that a choice of one is no choice at all.

B.

Bargaining at Local Level

Defendant also asserts that Plaintiff's refusal to bargain with it at the local level violates the terms of the RLA and

that Plaintiff should be ordered to participate in good faith negotiations with Defendant over the terms and conditions of the 1988 §6 notices.

It should first be noted that this Court has the power to issue an injunction in this case. The Norris-LaGuardia Act, 29 U.S.C. §§101-115, expresses a basic policy against the injunction of activities of labor unions. The United States Supreme Court has held, however, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to enjoin compliance with certain mandates of the RLA. *International Association of Machinists v. Street,* 367 U.S. 740, 772 (1961); *Virginian Rail Co. v. System Federation,* 300 U.S. 515 (1937).

"The heart of the Railway Labor Act is the duty, imposed by §2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 377-78 (1969). Section 2 First of the RLA is more than merely a statement of policy or exhortation to the parties. *Chicago & Northwestern Ry. Co. v. United Transportation Union,* 402 U.S. 570, 577 (1970). Congress was not pleading with labor and management to attempt to solve their differences. The words of §2 First create a legal obligation. *Id.* That legal obligation is enforceable by means of an injunction. *Id.*

The only remaining question is whether Plaintiff's refusal to bargain with Defendant at the local level is a violation of the duty to exert every reasonable effort to make and

maintain agreements concerning rates of pay, rules, and working conditions. This question needs little discussion. Clearly, refusing to negotiate is not exerting every reasonable effort to make or maintain an agreement. Plaintiff's refusal to negotiate violates the duty imposed by 45 U.S.C. §152 First.

VI.

Conclusion

The Court holds that Defendant is not required to engage in national handling under the Railway Labor Act. To hold otherwise would be to ignore the plain meaning of the statute. We further hold that Defendant has the right to select its bargaining representative without interference or influence from Plaintiff. Finally, we hold that Plaintiff's refusal to negotiate with Defendant is a violation of the duty to exert every reasonable effort to make and maintain agreements. Plaintiff is ordered to begin good faith negotiations with Defendant over the terms and conditions of the 1988 §6 notices.

Ergo, for the reasons discussed here, Plaintiff's motion for summary judgment (d/e 7) is DENIED. It is further ordered that Defendant's motion for summary judgment (d/e 4) is ALLOWED. It is further ordered that summary judgment is entered in favor of Defendant on its counterclaim.

ENTER: 2 March, 1990.

FOR THE COURT:
/s/RICHARD MILLS
Richard Mills
United States District Judge

APPENDIX C

No. 88 C 9607
Hon. Nicholas J. Bua, Presiding
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED TRANSPORTATION UNION,
Plaintiff,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Defendant.

ORDER

Based on an alleged violation of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, plaintiff United Transportation Union ("UTU") requests declaratory and injunctive relief. Specifically, UTU seeks to compel defendant Illinois Central Railroad Company ("Illinois Central") to engage in national collective bargaining. Illinois Central has filed a counterclaim, arguing that UTU is in violation of the Railway Labor Act by refusing to participate in local negotiations. Both parties now move for summary judgment on their respective claims. For the reasons stated herein, this court denies plaintiff's motion for summary judgment and grants defendant's motion for summary judgment.

I.

FACTS

UTU is an unincorporated labor organization that represents railroad employees throughout the United States and

Canada. Illinois Central is a major rail carrier which operates in seven states. Its operating employees are represented by UTU.

Since 1983, Illinois Central has significantly decreased the size of its operations; it has reduced its work force by 58%, sold off 19 line segments (the equivalent of approximately 3,500 route miles), and cut its rolling stock of diesel locomotives and freight cars in half. Due to the changing nature of its operations, Illinois Central decided to renegotiate existing labor agreements.

In the railroad industry, collective bargaining takes place on both a national and local level. When negotiations are conducted locally, a single employer bargains with an individual union. In contrast, national collective bargaining (commonly referred to as "national handling") involves multiple employers and unions. Typically, unions and railroads participate in national handling by giving their bargaining authority to a multi-carrier or multi-union bargaining agent. The bargaining agents then negotiate a single national agreement which is binding on all of the parties.

Despite Illinois Central's participation in national handling in the past,[1] it concluded that local negotiations would be more suitable for its current contract proposals. On April 19, 1988, Illinois Central notified UTU of its intention to renegotiate existing labor contracts.[2] At a conference held on May 18, 1988, Illinois Central informed UTU that it would not participate in national handling, and that it

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[1]Illinois Central's national bargaining agent was the National Carriers' Conference Committee of the National Railway Labor Conference, an organization which negotiates national agreements on behalf of railroad carriers.

[2]Pursuant to section 6 of the Railway Labor Act, 45 U.S.C. §156, the party seeking to renegotiate an existing labor agreement must give the other party thirty days written notice of the proposed changes.

intended to negotiate locally. On July 25, 1988, UTU served notice upon Illinois Central of its own contract proposals, and requested a conference within thirty days. A conference was held on August 4, 1988, during which Illinois Central re-emphasized its position against national handling. On October 14, 1988, Illinois Central made counterproposals for concurrent handling of UTU's proposed changes. Once again, Illinois Central expressed its desire to negotiate locally.

Claiming that Illinois Central is obligated to engage in national handling, UTU initiated this lawsuit. Illinois Central filed a counterclaim, seeking to compel UTU to participate in local negotiations. Both sides now claim that they are entitled to summary judgment.

II.

DISCUSSION

According to UTU, a party *must* participate in national handling if it would be appropriate to bargain nationally and if there is a history of national bargaining with respect to the disputed issue. *See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225, 229 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). This court disagrees.

Although the Railway Labor Act imposes a duty upon the carrier to negotiate in good faith, *see* 45 U.S.C. §152 First (1982), nothing in the Act suggests that a carrier is obligated to negotiate a national contract through a multi-carrier bargaining representative. Indeed, the Act recog-

nizes each party's right to choose their own bargaining representative. *See* 45 U.S.C. §152 Third, Fourth (1982).[3] As the Supreme Court has long recognized, this freedom of choice is the "essential foundation of the statutory scheme." *Texas & New Orleans R.R. v. Brotherhood of Ry. and Steamship Clerks,* 281 U.S. 548, 569 (1930). Thus, Illinois Central cannot be compelled to designate a multi-carrier representative as its bargaining agent. *American Ry. and Airway Supervisors Ass'n v. Soo Line R.R.,* 891 F.2d 675, 678 (8th Cir. 1989); *United Transp. Union v. Grand Trunk W. R.R.,* 712 F. Supp. 107, 110 (E.D. Mich. 1989); *see also United Transp. Union v. Duluth, Missabe & Iron Range Ry. Co.,* No. 5-88-0178, slip op. at 4 (D. Minn. Dec. 21, 1989).

Notwithstanding Illinois Central's statutory right to select its own bargaining representative, UTU claims that Illinois Central is still obligated to engage in national handling. UTU bases its argument on section 2 of the Railway Labor Act, which states that carriers and unions must "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." 45 U.S.C. §152 First (1982). That statutory provision, however, only requires the parties to put forth a good faith attempt to settle disputes. It does not specify the mode of dispute resolution. No court has ever held that a union may unilaterally refuse to negotiate locally and insist that the matter be resolved on a nationwide scale. Several courts,

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[3]Section 2 Third states as follows:

"Representatives . . . shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." 45 U.S.C. §152 Third (1982). Section 2 Fourth recognizes the employees' right "to organize and bargain collectively through representatives of their own choosing." 45 U.S.C. §152 Fourth (1892).

in fact, have reached the opposite conclusion. *See, e.g., Soo Line*, 891 F.2d at 679-80 (the railroad "has no obligation to accept national bargaining and is not bound by national negotiations in which it chooses not to participate"); *Grand Trunk*, 712 F. Supp. at 111 (union is not free to decline local negotiations and demand national handling); *Railway Labor Executives' Ass'n v. Soo Line R.R.*, No. 4-86-379, slip op. at 23 n.12 (D. Minn. Dec. 24, 1986) ("nothing in the [Railway Labor Act] requires that defendant accede to national handling . . .").[4] National multi-party bargaining is voluntary in nature, requiring the consent of each party. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982).[5] In the absence of mutual consent, this court will not force Illinois Central to bargain on a national level — especially since Illinois Central has remained ready and willing to bargain locally.

Even if this court had the authority to require national handling, UTU has not demonstrated that national handling

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[4]UTU relies on an isolated line of cases emanating from the D.C. Circuit's decision in *Atlantic Coast Line*. *See Delaware and Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *United Transp. Union v. Burlington N., Inc.*, 325 F. Supp. 1125 (D.D.C. 1971); *International Ass'n of Machinists and Aerospace Workers v. National Ry. Labor Conference*, 310 F. Supp. 905 (D.D.C. 1970), *appeal dismissed*, 463 F.2d 872 (D.C. Cir. 1972); *Chicago, Burlington & Quincy R.R. v. Railway Employes' Dep't, AFL-CIO*, 301 F. Supp. 603 (D.D.C. 1969). Yet, none of those decisions identify any statutory provision which requires a party to participate in national handling against its will. The court in *International Ass'n of Machinists* conceded this point: "[T]here is no express language in the Railway Labor Act that compels national handling." 310 F. Supp. at 911; *see also Atlantic Coast Line*, 383 F.2d at 229 ("The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest.").

[5]Of course, once a party has consented to national handling, and national negotiations have begun, that party's ability to withdraw from the negotiations may be limited. *Soo Line*, 891 F.2d at 678 (citing *Bonanno Linen*, 454 U.S. at 410-11 & n.5). Before negotiations have commenced, the parties remain free to withdraw from their multi-party bargaining units. *Id.* In the case at bar, Illinois Central has not consented to national handling, and bargaining has not commenced on any level.

is obligatory in this case. Relying on *Atlantic Coast Line* and its progeny, UTU argues that two factors should be considered: (1) the "practical appropriateness" of national handling, and (2) the "historical experience" of national bargaining on the particular issue. *Atlantic Coast Line*, 383 F.2d at 229. This court, however, is not convinced that national handling would be a practically appropriate method of resolving the current dispute. As the court in *Grand Trunk* pointed out, the Staggers Rail Act of 1980 ("Staggers Act") has diminished the practical utility of national handling in certain circumstances. *Grand Trunk*, 712 F. Supp. at 111-12. Prior to the enactment of the Staggers Act, railroads could increase their freight rates collectively. *Id.* at 111. After the Staggers Act went into effect, railroads were required to set their rates individually in order to foster a more competitive environment. *See* 49 U.S.C. §10101a (Supp. 1989); *Grand Trunk*, 712 F. Supp. at 112; *see also* Affidavit of Robert G. Richter, at 3, ¶4. To maintain this competitive environment, carriers need greater freedom to determine their own cost structures, especially labor costs. *Grand Trunk*, 712 F. Supp. at 112 (citing H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 42-43, 119-21 (1980)). If railroads could be compelled to participate in national negotiations, they would lose much of this freedom. The ability to freely engage in local negotiations is perhaps even more important to a railroad such as Illinois Central, which seeks to obtain labor agreements that are more con-

sistent with its current railroad operations. *See* Affidavit of Robert G. Richter, at 2, ¶3.[6]

Of the 11 unions that Illinois Central must bargain with, UTU is the only one which refuses to participate in local negotiations. UTU has a duty to negotiate with Illinois Central directly, and that duty cannot be avoided by demanding national handling.

III.

CONCLUSION

For the foregoing reasons, this court denies plaintiff's motion for summary judgment and grants defendant's motion for summary judgment. Plaintiff is hereby ordered to negotiate with defendant's rightfully chosen representative on a local basis with respect to all outstanding contract proposals.

IT IS SO ORDERED.

Dated: February 26, 1990

/s/ NICHOLAS J. BUA
Nicholas J. Bua
Judge, United States District Court

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[6]Moreover, the other factor set forth in *Atlantic Coast Line* — *i.e.*, whether the particular issues have been historically resolved on a national basis — is not a particularly compelling reason to require national handling in the instant case. As circumstances change over time (*e.g.*, the deregulation of the railroad industry or the restructuring of a particular railroad), the method of dispute resolution used in the past becomes less relevant in deciding how similar labor issues should be handled in the future. Unions and carriers may be discouraged from participating in national handling in the first place if such participation could conceivably obligate them to engage in national handling in the future. *American Ry. and Airway Supervisors Ass'n v. Soo Line R.R.*, 690 F. Supp. 802, 807 n.8 (D. Minn. 1988), *aff'd*, 891 F.2d 675 (8th Cir. 1989); *see also Railway Labor Executives' Ass'n*, No. 4-86-379, slip op. at 22-23.

APPENDIX D

Civil File No. 5-88-0178
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

United Transportation Union,

Plaintiff,

v.

Duluth, Missabe & Iron Range Railway Company,

Defendant.

MEMORANDUM AND ORDER

Richard A. Williams, Jr., Esq., Hvass, Weisman and King, 100 S. 5th Street, Suite 2100, Minneapolis, MN 55402 and Clinton J. Miller, III, Esq., Assistant General Counsel, United Transportation Union, 14600 Detroit Avenue, Cleveland, Ohio 44107-4250, for plaintiff.

Roger R. Roe, Jr., Esq., Rider, Bennett, Egan and Arundel, 2500 1st Bank Place West, Minneapolis, MN 55402, and Jeffrey S. Berlin, Esq., Richardson, Berlin and Morvillo, 2300 N Street, N.W., Suite 625, Washington, D.C. 20037, for defendant.

This matter is before the court upon the parties' cross motions for summary judgment. For the reasons set forth below, the plaintiff's motions are DENIED and the defendant's motion is GRANTED.

FACTS

This is a railroad labor dispute. In Count I, plaintiff seeks a declaratory order that defendant is violating the Railway Labor Act ("RLA") "status quo" provision by refusing to submit to national, multiple employer bargaining (national handling) with plaintiff over certain wage and work-rule issues. In Count II, plaintiff seeks an injunction ordering defendant to submit to national handling. In its counterclaim, defendant seeks a declaratory order that plaintiff's action violates its RLA right to self-representation and an injunction requiring plaintiff to bargain locally.

Defendant Duluth, Missabe and Iron Range Railway Company operates 581 miles of track in northeastern Minnesota and northwestern Wisconsin. Virtually all of its business consists of hauling iron ore to several Minnesota processing plants. Plaintiff United Transportation Union is a national union which represents several classes of defendant's employees.

For the past twenty years, plaintiff and defendant have engaged in national multi-employer bargaining over wages and work rules, defendant being represented by the National Carriers' Conference Committee (NCCC). The currently effective national wages and work rules agreement is dated October 31, 1985, and contained a moratorium on the service of new bargaining proposals relating to the subject matter of the agreement until April 1, 1988.

On January 16, 1987, defendant informally notified plaintiff that it intended to negotiate locally, not nationally. The parties subsequently exchanged section 6 notices under the RLA, 45 U.S.C. § 156, regarding proposed changes in their collective bargaining agreement. Following the failure to agree on the national handling issue, plaintiff brought this action. Defendant has not submitted to national handling.

DISCUSSION

The operative facts recited above are not in dispute. Under Fed. R. Civ. P. 56, consequently, the court is free to determine which party is entitled to judgment as a matter of law.

Both counts of plaintiff's action depend on *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) and its progeny. *Atlantic Coastline* held that a party was not obligated to submit to national handling, but contains language suggesting that in certain circumstances the "status quo" provision of the RLA, 45 U.S.C. § 152 First, mandates national handling. The RLA also, however, provides each party the freedom to select its own bargaining representative. 45 U.S.C. § 152 Third. The issue is thus which of these two positions applies here. The Eighth Circuit has squarely addressed this issue in *American Railway and Airway Supervisors Association v. Soo Line Railroad Co.*, — F.2d. — , 1989 WL 149752, slip op. of Chief Judge Lay (8th Cir. Dec. 13, 1989). Refusing to apply *Atlantic Coast Line*, the *Soo Line* Court held: "Because a new round of national bargaining had not yet begun when Soo announced its intention to bargain locally, nothing prevents it from withdrawing from its national negotiating coalition." Slip op. at 8. The *Soo Line* also held:

> We also cannot accept the union's argument that the railroad must serve section 6 notice of its intent to withdraw from national bargaining, and that it first must bargain over this "change." The selection of a bargaining agent is not a subject of mandatory bargaining under the Act. Nor is it a term in any existing agreement. It is a right reserved to the parties by the Act.

Id.

Accordingly, plaintiff's action must fail as a matter of law.

The remaining issue is defendant's counterclaim for declaratory and injunctive relief that plaintiff has violated its duty to negotiate in good faith under the RLA, 45 U.S.C. § 152 First. Plaintiff cannot rely on its mistaken premise of law in refusing to bargain with defendant's chosen representative. *E.g., Brotherhood of Railroad Trainmen v. Akron and Barberton Belt R.R.*, 385 F.2d 581, 597-98 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968). As the *Soo Line* court noted, "Correlative to this right [to bargain locally], the railroad does have a duty to bargain with the representative or representatives so designated by the unions; it must bargain in good faith as to the terms and conditions of health and welfare coverage of the various employees represented by the union representatives." Slip op. at 10. Here, conversely, the union has a duty to bargain with the railroad's rightfully chosen representative.

Accordingly, IT IS ORDERED that:

1. Defendant's motion for summary judgment on plaintiff's claims is GRANTED, and plaintiff's motion DENIED.

2. Defendant's motion for summary judgment on its counter claim is GRANTED. The court finds that plaintiff must, pursuant to its duty to bargain in good faith, negotiate with defendant's chosen representative.

Dated: December 21, 1989.

/s/ PAUL A. MAGNUSON
Paul A. Magnuson
United States District Court Judge

APPENDIX E

Statutes Relied Upon:

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 151 Sixth.

> The term "representative" means any person or persons, labor union, organization or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

B. Section 152 First.

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

C. Section 152 Second.

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

D. Section 152 Third.

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party

over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

E. Section 156.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

No. 89-1435

(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, ET AL., PETITIONERS

v.

SOO LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a party to a nationwide bargaining agreement under the Railway Labor Act may decide, prior to commencement of bargaining over proposed changes to the railroad industry's national health and welfare plans, that it will not participate in national bargaining but instead will negotiate separately over its proposal to withdraw from the national plans.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Brotherhood of R.R. Trainmen v. *Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), cert. denied, 389 U.S. 1047 (1968) 7, 14, 15

Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) 3, 15

Charles D. Bonanno Linen Serv., Inc. v. *NLRB*, 454 U.S. 404 (1982) 7, 8, 16

Chicago, B. & Q. R.R. v. *Railway Employes' Dep't*, 301 F. Supp. 603 (D.D.C. 1969) 3, 14

Chicago & N.W. Ry. v. *UTU*, 402 U.S. 570 (1971) 1

EEOC v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985) 16

IAM v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), cert. denied, 411 U.S. 982 (1973) 16

NLRB v. *Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) 16

Pittsburgh & L.E. R.R. v. *RLEA*, 109 S. Ct. 2584 (1989) 2, 11

Pullman Co. v. *Order of Ry. Conductors & Brakemen*, 316 F.2d 556 (7th Cir.), cert. denied, 375 U.S. 820 (1963) 14

Texas & N. O. R.R. v. *Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) 10

Trans World Airlines, Inc. v. *Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225 (1989) 15

Trans World Airlines, Inc. v. *Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir. 1987), aff'd, 485 U.S. 175 (1988) 16

Statutes: Page

Railway Labor Act, 45 U.S.C. 151 *et seq.* 1
§ 2, 45 U.S.C. 151a 13
§ 2 First, 45 U.S.C. 152 First 1, 6, 12
§ 2 Second, 45 U.S.C. 152 Second 12
§ 2 Third, 45 U.S.C. 152 Third 2, 6, 10, 17
§ 2 Fourth, 45 U.S.C. 152 Fourth 10
§ 2 Seventh, 45 U.S.C. 152 Seventh 3
§ 5 First, 45 U.S.C. 155 First 2, 3
§ 6, 45 U.S.C. 156 ..... 2, 3, 16
§ 7, 45 U.S.C. 157 2
§ 10, 45 U.S.C. 160 ..... 3, 5

Miscellaneous:

Exec. Order No. 12,714, 55 Fed. Reg. 19,047 (May 3, 1990) 5

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SOO LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Labor relations in the rail and air transportation industries are governed by the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA or Act). The RLA imposes on both carriers and employees a duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions * * *." 45 U.S.C. 152 First. See generally *Chicago & N.W. Ry.* v. *UTU*, 402 U.S. 570, 574-578 (1971).

The Act establishes a multi-stage process to encourage the voluntary resolution of major disputes.[1] Section 6 of the RLA, 45 U.S.C. 156, provides that a carrier or employee representative wishing to change an existing collective bargaining agreement must give at least 30 days written notice "of an intended change in agreements affecting rates of pay, rules, or working conditions * * *." Within ten days after receipt of the notice, the parties must agree upon the time and place for a conference between the representatives of the parties interested in such intended changes, and the conference must begin within the 30-day period set out in the notice. *Ibid.*

Section 2 Third of the Act, 45 U.S.C. 152 Third, provides that "representatives * * * shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." If the conference between carrier and employee representatives fails to produce an agreement, then

> either or both [parties] may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. [45 U.S.C. 155 First.] If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. [45 U.S.C. 155 First, 157.] If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation

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[1] "Major disputes" are disputes about rates of pay, rules, or working conditions. "Minor disputes" are disputes about the interpretation or application of existing contracts. Minor disputes, unlike major disputes, are subject to compulsory arbitration. See *Pittsburgh & L.E. R.R.* v. *RLEA*, 109 S.Ct. 2584, 2589 n.4 (1989).

> Board shall notify the President," who may create an emergency board to investigate and report on the dispute. [45 U.S.C. 160.] While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. [45 U.S.C. 152 Seventh, 155 First, 156, 160.]

Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

2. Since 1954, many rail carriers and rail labor unions have negotiated national health and welfare plans covering rail employees.[2] Soo Line Railroad Co. (Soo), and its corporate predecessors, have participated in the national health and welfare plans since their inception; petitioner unions also participate in the plans. The national health and welfare plans were developed in national bargaining, also known as "national handling."[3] The health

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[2] The original 1954 agreement resulted in a national group health and life insurance policy. Subsequent negotiations resulted in a national dental insurance plan and a national major medical insurance plan for retirees. Pet. 4-5.

[3] "National handling" is not defined or even mentioned in the RLA. The court of appeals stated that " 'national handling' * * * refers to the collective bargaining practice whereby railroads and unions give bargaining authority to multi-carrier and multi-union committees, agreeing in advance to be bound by a national agreement reached by the two committees." Pet. App. 2a n.1. The district court stated that "rail labor unions and rail carriers have generally negotiated employee benefits on a national basis with designated national bargaining agents negotiating any changes. This is referred to as 'national handling.' " Pet. App. 12a-13a (quoted in Pet. C.A. Br. 6). In their petition, the unions argue that "there is nothing inherent in the nature of national handling which requires the designation of the same bargaining agents" by all carriers. Pet. 21-22. The unions observe that, until the 1970s, the carriers were represented by three regional carrier conference committees, which in turn selected a single negotiator without authority to bind the committees. Pet. 21 n.8; see *Chicago, B. & Q. R.R.* v. *Railway Employes' Dep't*, 301 F. Supp. 603, 607 (D.D.C. 1969).

As discussed more fully below, we agree with the unions that, aside from practical concerns about manageability, there is no

and welfare agreements, like most railroad industry agreements under the RLA, have no fixed duration, but typically contain "moratorium clauses" that obligate the parties to refrain from serving Section 6 notices for a specified period of time. Over the years, the national health and welfare plans have been modified through the national bargaining agents designated by the respective parties. The carriers typically have designated the National Carriers' Conference Committee (NCCC) as their national bargaining agent, while the unions have also designated a national bargaining agent such as the Health and Welfare Committee of the Cooperating Railway Labor Organizations (CRLO). As of 1985, the national health and welfare plans covered approximately 320,000 active employees of 242 railroads. Pet. App. 2a-3a, 12a-13a.

In early 1984, petitioner unions, pursuant to Section 6 of the RLA, served notice on Soo and other carriers that the unions intended to request changes to the national collective bargaining agreement, including the national health and welfare plans. Pet. App. 2a. The notices requested that Soo waive its right to conduct direct negotiations with the unions and authorize the NCCC to act for Soo in national bargaining. Pet. 5; Br. in Opp. 6. Soo agreed to participate in national bargaining over some of the proposed changes and to designate NCCC as its bargaining representative with respect to those proposals. But the railroad informed the unions that it would not designate NCCC as its bargaining agent with respect to the proposed changes in the health and welfare plans, and would not participate in national bargaining over those proposals. Instead, Soo informed the unions that it would negotiate separately with the unions over

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inherent reason why national bargaining must be conducted with a single representative on each side. We therefore agree that the selection of bargaining agents and the choice between national and "local" bargaining are distinct issues.

its own proposal to withdraw from the national health plans in favor of a self-insurance plan.[4] Pet. App. 13a.

Soo conducted separate negotiations and reached separate agreements with 8 of the 19 unions that represent its employees. Pet. App. 13a-14a & n.3. The remaining 11 unions, which represent about 90% of Soo's employees, refused to enter into separate negotiations with Soo. *Ibid.* These unions filed suit in federal district court to compel Soo to continue its participation in the national health and welfare plans and to participate in national bargaining on proposed changes to those programs. Soo counterclaimed, asserting that petitioner unions were violating the RLA by refusing to negotiate with Soo's designated bargaining representative over employee benefits. *Id.* at 12a. The railroad also invoked the mediatory services of the National Mediation Board (Br. in Opp. 7).[5] Soo continues to pay premiums on the national health and welfare plans for its employees represented by unions with which Soo has not reached a new agreement. Pet. App. 14a.[6]

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[4] The unions do not argue that Soo's decision to appoint the NCCC as its bargaining agent with respect to some issues but not others is prohibited by the RLA or the collective bargaining agreement. Thus, as the court of appeals noted, this case does not present the question whether "it is a modification of the collective bargaining agreement to sever the health and welfare issue from negotiation of wages and working conditions which are still authorized for national bargaining." Pet. App. 4a n.6.

[5] We are informed that mediation has been delayed pending resolution of this lawsuit.

[6] On May 3, 1990, pursuant to 45 U.S.C. 160, President Bush signed an Executive Order creating, effective May 5, a Presidential Emergency Board to investigate and report on disputes between most of the nation's major railroads, represented by the NCCC, and their employees, represented by 11 unions. Exec. Order No. 12,714, 55 Fed. Reg. 19,047. Hearings before the Emergency Board began the week of May 14. Although these disputes involve proposed modifications to the national health and welfare plans, it appears that the dispute involved in this case is not one of those referred to the Emergency Board.

3. The district court (Pet. App. 12a-23a) granted summary judgment for Soo on the unions' complaint. The court rejected the unions' contention that Soo had violated the RLA by refusing to participate in national bargaining and by engaging in separate negotiations over its proposal to withdraw from the national programs. The district court stated that the case posed two procedural questions: first, who will represent the parties at the bargaining table, and second, where the bargaining will take place. *Id.* at 17a.

With respect to the first question, the court held (Pet. App. 17a) that the RLA expressly guarantees each party the right to select its own bargaining representative. 45 U.S.C. 152 Third. The court therefore concluded that Soo "could not be required to designate the NCCC to negotiate on its behalf." Pet. App. 17a. The court observed that the unions "virtually acknowledged that fact by 'respectfully requesting' Soo to designate the NCCC as its representative." *Ibid.* In addition, the court noted, the choice of a bargaining representative does not appear to concern rates of pay, rules, or working conditions, and so is not a subject of mandatory bargaining under 45 U.S.C. 152 First. Pet. App. 17a.

As to the location of the bargaining between Soo's designated representative and the unions' representative or representatives, the court stated: "It appears that [national handling] would normally encompass centralized negotiations between two bargaining representatives, each of which represents more than one carrier or union, that result in a single agreement that applies to all of the participants." At times, however, "it appears that a single carrier or union may bargain with the collective representative of the other side." Pet. App. 17a. Accordingly, the court said, "it is possible that Soo, even if it chose to represent itself, may have been required to participate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO, as well as with the NCCC." *Id.* at 18a.

The district court held that Soo was not required to participate in the national negotiations. Pet. App. 20a-21a. The court, analogizing the law governing withdrawal from multi-employer bargaining units under the National Labor Relations Act (NLRA), see *Charles D. Bonanno Linen Serv., Inc.* v. *NLRB*, 454 U.S. 404, 410-411 & n.5, 412 (1982), reasoned that Soo had withdrawn prior to the commencement of negotiations and therefore should not be required to participate in national bargaining. The court further held that Soo was not required to file a Section 6 notice of its intention to withdraw from national bargaining, since the railroad's response to the unions' Section 6 notices gave the unions sufficient notice of the railroad's proposal. Pet. App. 21a.

The district court also rejected the unions' arguments based on *Brotherhood of R.R. Trainmen* v. *Atlantic Coast Line R.R.*, 383 F.2d 225, 229 (D.C. Cir. 1967), cert. denied, 389 U.S. 1047 (1968). In *Atlantic Coast Line*, the Court of Appeals for the District of Columbia Circuit said that the question whether national handling is "obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." 383 F.2d at 229. The district court here observed that the parties in the *Atlantic Coast Line* case were not required to participate in national handling, and concluded that subsequent cases "have found national handling to be obligatory only after the parties had commenced national bargaining and then attempted to withdraw or take action inconsistent with national handling." Pet. App. 19a. The court also held that, even if the *Atlantic Coast Line* standard were applicable in this case, it is "far from clear that national handling is the most practically appropriate manner in which to handle bargaining over health and welfare benefits." Pet. App. 21a-22a. The court pointed out (*id.* at 22a) that not all carriers participate in the national health and welfare plans, and that Soo had

succeeded in reaching individual agreements with 8 of 19 unions.[7]

4. The court of appeals affirmed. Pet. App. 1a-10a. The court held that 45 U.S.C. 152 Third and Fourth expressly afford both Soo and the unions the right to select their own bargaining representatives. The court of appeals, like the district court, drew on this Court's decision in the *Bonanno Linen* case to hold that a party may withdraw from national bargaining under the RLA so long as it does so before negotiations begin. Pet. App. 7a-8a. The court rejected the unions' argument that, because of the unique nature of railroad labor contracts, the NLRA rule is not applicable in the RLA context. *Ibid.* Although railroad agreements typically lack a definite termination date, the court concluded that "[t]he clear import of the RLA is that each proposal for modification under section 6 initiates a new, distinct set of negotiations for which the parties are free to select new bargaining agents." *Id.* at 8a. "To conclude otherwise," the court reasoned, "would, in effect, perpetually bind a carrier (or a union) to national representation once it agrees to such representation for a particular bargaining round. * * * [A]s a policy matter, this would have the negative effect of discouraging parties from utilizing the national bargaining tool in the first place." *Ibid.*

The court of appeals also rejected the unions' argument that the railroad was required to serve a Section 6 notice of its intent to withdraw from national bargaining and to bargain over this "change" before bargaining over the substance of a new plan. The court reasoned that "the selection of a bargaining agent is not a subject of mandatory bargaining under the Act. Nor is it a term in any existing agreement." Pet. App. 8a. The court of appeals observed that the unions, like the carriers, have the right to designate their bargaining representative, and are free to select a representative to "bar-

[7] The district court dismissed Soo's counterclaim without prejudice. Pet. App. 22a, 26a-27a.

gain for terms that match or exceed those of the current health and welfare plans." *Id.* at 9a. Finally, the court stated that "the railroad * * * [has] a duty to bargain with the representative or representatives * * * designated by the unions; it must bargain in good faith as to the terms and conditions of health and welfare coverage of the various employees represented by the union representatives." *Id.* at 10a.

DISCUSSION

Petitioners contend (Pet. 9-22) that Soo's proposal to withdraw from the national health and welfare plans must be negotiated at the national bargaining table. This is a relatively narrow contention as to which there is no conflict among the courts of appeals. Moreover, we believe the court of appeals properly affirmed the district court's grant of summary judgment. Consequently, this case does not warrant further review.

1. We note at the outset that the scope of the dispute between petitioner unions and Soo has been narrowed significantly by concessions made during the course of the litigation. In their petition (Pet. 20-22), the unions concede that Soo is not required to select the NCCC as its bargaining representative. Petitioners recognize that the railroad "unquestionably has the right to designate its own representative for collective bargaining" (*id.* at 4; see also *id.* at 20), and that the railroad may choose either to designate the NCCC as its representative or to "c[o]me to the national bargaining table as its own representative." *Id.* at 20. In addition, petitioners concede that, so long as Soo "participated in the national bargaining and bargained in good faith, it could refuse to agree to every proposal for changes in the national plans and could bargain to impasse on its own proposal for its withdrawal from the national plans." *Id.* at 20-21. Thus, the unions no longer argue, if they ever did, that the RLA requires Soo to continue its participation in the national health and welfare plans. Instead, the unions

recognize that Soo's continued participation is a matter for negotiation. For its part, Soo does not dispute that it is required to negotiate over its proposal to withdraw from the national health and welfare plans, and is obligated to continue its participation in the national plans until it reaches agreement or exhausts the procedures enumerated in the RLA.[8] See Br. in Opp. 7.

2. As we understand its decision, the court of appeals decided three distinct issues. First, it held that Soo need not bargain with the unions over its decision not to designate the NCCC as its bargaining representative. Second, the court held that Soo's proposal to withdraw from the national health and welfare plans and substitute its own self-insurance plan is a subject of mandatory bargaining under the RLA. Finally, the court of appeals held that Soo need not negotiate at the national bargaining table, but may engage in separate "local" negotiations with the unions. The parties now agree on the resolution of the first two issues; the third, in our view, does not warrant the attention of this Court.

a. As to the first issue, the unions concede that Soo is not required to bargain over its refusal to designate the NCCC as its bargaining representative. This is plainly correct. As this Court has observed, "[f]reedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme." *Texas & N. O. R.R.* v. *Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569 (1930). The plain language of 45 U.S.C. 152 Third and Fourth grants both carriers and unions the right to select their own bargaining representatives. In addition, the designation of a party's bargaining representative generally is not the subject of any express or implied agreement between the carriers and the unions, and therefore is not subject to

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[8] There is also no dispute over the geographical location of the bargaining. Soo has stated that it is willing to negotiate in Washington, D.C., where the national negotiations are conducted. Pet. App. 10a n.11.

section 6 notice and bargaining.[9] Cf. *Pittsburgh & L.E. R.R.* v. *RLEA*, 109 S. Ct. 2584, 2592-2593 (1989) (no express or implied agreement that carrier would not sell its assets). Accordingly, Soo was entitled to select its own bargaining representative before the bargaining commenced. The unions likewise were free to select their own representatives. Presumably, the unions could designate the Health and Welfare Committee of the CRLO (the unions' representative in the national health and welfare negotiations) as their sole representative in negotiations with Soo.[10]

b. As to the second issue, Soo correctly recognizes that it must adhere to the terms and conditions of the existing national agreement on health and welfare until such time as it either reaches a new agreement with the unions' bargaining representatives or exhausts its mandatory bargaining obligations under the RLA. Br. in Opp. 7. And the unions concede that Soo is entitled to bargain to impasse over its proposal to withdraw from the national plans. Pet. 20-21. The parties thus agree that Soo's withdrawal proposal is a subject of mandatory bargaining. It follows that the unions are incorrect in asserting (*id.* at 12) that the decision of the court of appeals permits carriers to "exit from national agreements merely by refusing to participate in [national] negotiations." On the contrary, Soo must negotiate over whether it may exit from the national plans. At this stage, Soo's proposal to withdraw is simply that—a proposal to the unions. The unions are free to propose that Soo remain

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[9] The court of appeals stated that selection of a bargaining agent was not "a term in any existing agreement" between Soo and the unions. Pet. App. 8a.

[10] In some instances the NCCC, as national bargaining representative for the railroads, has negotiated separately with individual unions. See Pet. App. 17a. We see no objection to a national bargaining agent for the unions bargaining separately with individual railroads.

in the national plans, and to adhere to their position within the limits of good-faith bargaining.[11]

c. The only remaining issue in dispute, we believe, is whether the bargaining between Soo and the unions will take place at the national bargaining table or at a separate "local" bargaining table. To the extent that this is an issue of substance as well as form, we agree with the courts below that separate bargaining is appropriate.

One consequence of the unions' position in this case is that Soo might be required to bargain with parties other than the unions representing its own employees—for example, unions that represent only employees of other railroads participating in the national plans. But it is far from clear that either the NCCC, as the bargaining representative of carriers other than Soo, or unions that do not represent Soo employees, have any statutory right to participate in bargaining over Soo's proposal to withdraw from the national plans in favor of a self-insurance plan. Petitioners do not suggest that such a right can be found in the collective bargaining agreement. Nor is such a right expressly conferred by any provision of the RLA.[12] Moreover, the unions' position, if adopted by the courts, could have disturbing and far-reaching consequences. For example, several railroads could prevent

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[11] We see no reason why other participants in the national health and welfare plans would object if Soo and the unions were to agree, in "local" negotiations, that Soo should continue as a participant in the national plans. Petitioners themselves contend that adding additional carriers to the national health and welfare plans reduces the cost of those plans to all participants. See Pet. 13-14.

[12] It might be argued that such a right is implied by the statutory duty to maintain collective bargaining agreements (45 U.S.C. 152 First). But to imply such a right would strain the text of the statute, and would appear to be inconsistent with the statutory requirement that "[a]ll disputes between a carrier or carriers and its or their employees shall be considered * * * in conference between representatives designated * * *, respectively, by the carrier or carriers *and by the employees thereof* interested in the dispute." 45 U.S.C. 152 Second (emphasis supplied).

a competing railroad from concluding a separate agreement on wages by refusing to permit the railroad to withdraw from a nationwide wage agreement.

Petitioners do not explain how national bargaining over Soo's withdrawal proposal could be integrated with bargaining over the unions' proposed changes to the national health and welfare plans. The two proposals are quite different. At the very least, such integrated national bargaining, with multiple bargaining representatives on each side and multiple proposals on the table, would be cumbersome. In practice, it might well turn out that Soo's withdrawal proposal and the proposed changes to the national plans would be negotiated at separate bargaining sessions.

If Soo were required to participate in national bargaining, its insistence on withdrawing from the national plans could lead to an impasse at the national level even if the NCCC, as representative of the other carriers, agreed with the union representatives on changes to the national plans. The risk of impasse would be multiplied if several carriers or unions declined to grant negotiating authority to national bargaining representatives and instead came to the national bargaining table with their own conflicting proposals. Such a bargaining structure is unlikely to promote "the prompt and orderly settlement of * * * disputes" between carriers and their unions. See 45 U.S.C. 151a. Consequently, we believe the court of appeals reasonably concluded that Soo is not required to participate in the national bargaining.

We also agree with the courts below that Soo did not violate the RLA by failing to provide a formal Section 6 notice of its refusal to appoint the NCCC as its bargaining representative and its intention to propose its withdrawal from the national health and welfare plans in separate negotiations. The unions initiated the negotiation process by serving Soo with a Section 6 notice of proposed changes in the national plan. Soo responded by notifying the unions of its decision not

to participate in the national negotiations and to negotiate for a separate self-insurance plan. Soo's notice adequately informed the unions of "the purpose sought to be attained" by Soo, and so satisfied the practical requirements of Section 6. See *Pullman Co.* v. *Order of Ry. Conductors & Brakemen*, 316 F.2d 556, 562 (7th Cir.), cert. denied, 375 U.S. 820 (1963).

3. We recognize that the decision of the court of appeals is in some tension with dicta in the opinion of the District of Columbia Circuit in *Brotherhood of R.R. Trainmen* v. *Atlantic Coast Line R.R., supra.* But we do not believe there is a conflict. In the *Atlantic Coast Line* case, the court of appeals declined to require national handling of a dispute over the size of the "crew consist" of conductors and trainmen on railroad yard and road crews. In the course of its opinion, the court stated that "[w]hether [national handling] is * * * obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." 383 F.2d at 229. As the courts below observed, neither *Atlantic Coast Line* nor any other decision of a court of appeals has held that national handling is obligatory where a party announces its intention to bargain locally in advance.[13] See Pet.

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[13] In *Chicago, B. & Q. R.R.* v. *Railway Employes' Dep't*, 301 F. Supp. 603 (D.D.C. 1969), the district court held that a Section 6 notice requesting amendments to an existing national agreement on "contracting out" should have been served on all parties to the national agreement rather than on a single railroad. In that case, however, the unions attempted to break up a multiemployer bargaining unit by serving the Section 6 notice only on a single carrier. There is an obvious difference between a party's own choice not to participate in a national bargaining unit and efforts to force another party out of a bargaining unit. In addition, the unions in the *Chicago, B. & Q.* case attempted to negotiate with a single carrier over proposed amendments to a national agreement signed by 147 carriers. *Id.* at 605. Again, there is a difference between proposing to withdraw from a national agreement and proposing to amend the national agreement.

App. 18a-20a (discussing cases). There is thus no basis for concluding that the District of Columbia Circuit would have decided this case differently. Indeed, the district court in this case expressly considered the "historical experience" and "practical appropriateness" of national handling of health and welfare issues in the railroad industry, and concluded that national handling was not mandatory even under the dicta of *Atlantic Coast Line*.[14] See Pet. App. 21a-22a.

4. Finally, we agree with the courts below that the rule of *Bonanno Linen*, *supra*, is an appropriate one in the context of the RLA.[15] The process established by the RLA for resolving major disputes is, above all, a process for reaching voluntary agreements. See *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 378. No provision of the RLA requires or even refers to national handling, let alone requires national handling on the basis of "practical appropriateness" or "historical experience." We therefore see no basis in the RLA for requiring a carrier or union to submit to national bargaining where, as here, the party announces in advance of any bargaining that it chooses not to be included in the national bargaining unit.

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[14] Even if national bargaining were required under *Atlantic Coast Line*, petitioners concede that Soo is entitled to appoint its own bargaining representative and bargain to impasse over its proposal to withdraw from the national health plans. In our view, the narrow question whether Soo is required to send its representative to the national bargaining table—and thus bargain with parties to the national agreement other than the representatives of its own employees—does not warrant the attention of this Court in the absence of a clear-cut conflict among the circuits.

[15] Although the Court has cautioned against wholesale transfer to the RLA of rules fashioned in the context of the NLRA, see *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 383, it also has recognized that the NLRA may afford a helpful analogy in RLA cases. See *Trans World Airlines, Inc.* v. *Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225, 1230 (1989).

We recognize that national bargaining under the RLA, like multiemployer bargaining under the NLRA, may in many instances play a role "in the effectuation of the national policy of promoting labor peace." 454 U.S. at 409 (quoting *NLRB* v. *Truck Drivers Local Union No.* 449, 353 U.S. 87, 95 (1957)). Thus, considerations similar to those that gave rise to the NLRB rule approved in *Bonanno Linen* may well justify requiring that once a party has chosen to designate a representative and to enter into national bargaining in connection with a particular Section 6 notice, the party cannot then revoke that decision. For example, if a party to national handling were permitted to withdraw simply because the agreement turns out to be less favorable than expected, the result would be to "undermine the utility of multiemployer [or multi-union] bargaining." 454 U.S. at 412 & n.8.

The unions argue that the rule of *Bonanno Linen* should not be applied in the RLA context because "[NLRA] agreements * * * expire" while "RLA agreements continue indefinitely."[16] Pet. 19 n.6. The unions' distinction is not persuasive. The absence of an expiration date in many collective bargaining agreements negotiated under the RLA does not imply that Congress contemplated that those agreements would continue indefinitely. On the contrary, the statute provides that changes may be proposed by any party on only 30 days' notice. 45 U.S.C. 156. In fact, railroads and their unions routinely resort to moratorium clauses to provide an added measure of durability to agreements under

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[16] In fact, many agreements negotiated under the RLA, notably in the airline industry, contain durational clauses. The interaction of these clauses and the provisions of the RLA have been a matter of dispute in the courts of appeals. See, *e.g.*, *Trans World Airlines, Inc.* v. *Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir. 1987), aff'd by an equally divided Court, 485 U.S. 175 (1988); *EEOC* v. *United Air Lines*, 755 F.2d 94 (7th Cir. 1985); *IAM* v. *Reeve Aleutian Airways*, 469 F.2d 990 (9th Cir. 1972), cert. denied, 411 U.S. 982 (1973).

the RLA. We agree with the courts below that the express statutory right of each party to select its own bargaining representative, 45 U.S.C. 152 Third, comes into play each time a party initiates a new round of bargaining by serving a Section 6 notice on the other parties to the agreement. If the choice to engage in national bargaining were irrevocable and perpetual, national bargaining would soon cease to promote labor peace.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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